CUSTOMS BULLETIN AND DECISIONS

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Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 97–74)

BONDS

APPROVAL TO USE AUTHORIZED FACSIMILE SIGNATURES AND SEAL

The use of facsimile signatures and seal on Customs bonds by the following corporate surety has been approved effective this date:

INTERCARGO INSURANCE COMPANY

Authorized facsimile signature on file for:

Stanley A. Galanski

The corporate surety has provided the Customs Service with copies of the signatures to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seal. This approval is without prejudice to the surety's right to affix signatures and seal manually.

Date: August 27, 1997.

JERRY LADERBERG,
Chief,
Entry Procedures and Carriers Branch.

[Published in the Federal Register, September 3, 1997 (62 FR 46549)]

19 CFR Parts 7, 10, 148 and 178

(T.D. 97–75)

RIN 1515–AB14

DUTY-FREE TREATMENT OF ARTICLES IMPORTED FROM U.S. INSULAR POSSESSIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some modifications, proposed amendments to the Customs Regulations to clarify and update the legal requirements and procedures that apply for purposes of obtaining duty-free treatment on articles imported from insular possessions of the United States other than Puerto Rico. The final regulatory amendments include certain organizational changes to improve the layout of the regulations and also clarify and update the personal exemption provisions applicable to returning residents.

EFFECTIVE DATE: October 3, 1997.

FOR FURTHER INFORMATION CONTACT: Monika Rice, Office of Regulations and Rulings (202–482–7049).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 27, 1993, Customs published in the Federal Register (58 FR 40095) a notice of proposed rulemaking to amend Parts 7, 10 and 148 of the Customs Regulations (19 CFR Parts 7, 10 and 148) as regards duty-free treatment of articles imported from insular possessions of the United States other than Puerto Rico. The proposed amendments to Part 7 included replacement of present § 7.8 by two new §§ 7.2 and 7.3, the latter section representing an update and elaboration of the substantive requirements and procedures for obtaining duty-free treatment on products of U.S. insular possessions under General Note 3(a)(iv) of the Harmonized Tariff Schedule of the United States (HTSUS). The proposed Part 10 amendments involved primarily the transfer to Part 7 of a section of the regulations dealing with watches and watch movements from U.S. insular possessions. The proposed Part 148 amendments involved an updating of the regulations that implement the personal duty exemption or reduction provisions applicable to returning residents and other persons arriving from certain U.S. insular possessions or from Caribbean Basin Initiative (CBI) beneficiary countries as provided for in Subchapters IV and XVI of Chapter 98, HTSUS.

With particular regard to the requirements and procedures for obtaining duty-free treatment under General Note 3(a)(iv), HTSUS, the

July 27, 1993, notice pointed out that, as compared to the regulations implementing the Generalized System of Preferences (GSP), set forth as §§ 10.171–10.178, Customs Regulations (19 CFR 10.171–10.178), and the regulations implementing the CBI, set forth as §§ 10.191–10.198, Customs Regulations (19 CFR 10.191–10.198), § 7.8 did not reflect all of the provisions of General Note 3(a)(iv), HTSUS, and did not provide adequate guidance concerning the legal effect of those provisions, particularly as to the determination of the origin of goods imported from insular possessions, the meaning of direct shipment to or from an insular possession, and the application of the maximum foreign materials content limitation. Thus, subject to variances to reflect a General Note 3(a)(iv) insular possession context, the proposed § 7.3 text adopted the more detailed approach used in the GSP and CBI regulations in setting forth, among other things, specific origin determination language (for example, "growth or product", "substantially transformed", "new and different article of commerce") applicable to goods from insular possessions and materials incorporated in such goods (paragraphs (b) and (c)) as well as a specific rule regarding direct shipment to or from an insular possession (paragraph (e)).

Discussion of Comments

A total of seven comments were submitted in response to the notice. All of the commenters generally favored the proposed regulatory changes, particularly with regard to the reduced documentary burden and the inclusion of the Commonwealth of the Northern Mariana Islands. However, some commenters suggested certain changes to the proposed § 7.3 texts which are discussed in detail below.

Comment:

Several commenters indicated that the words "may be eligible" in proposed § 7.3(a) should be replaced with the words "shall be eligible." Otherwise, despite compliance with the provisions of General Note 3(a)(iv), HTSUS, Customs would have impermissible discretion in allowing duty-free treatment.

Customs response:

Customs disagrees. While goods imported from U.S. insular possessions which satisfy the requirements and conditions set forth in General Note 3(a)(iv), HTSUS, "are exempt from duty", and even though proposed §§ 7.3(a)(1) and (2) state which goods are eligible for duty-free treatment, documentary requirements were included in proposed § 7.3(f) for the specific purpose of demonstrating that the imported goods meet the statutory requirements for duty-free entry. *See Maple Leaf Petroleum, Ltd. v. United States*, 25 C.C.P.A. 5, 8, 9, T.D. 48976 (1937), for the proposition that it has long been the sound policy of our Government that when such grants and privileges as those involved here were allowed in customs matters, they were granted only upon the condition that there should be a compliance with regulations to be prescribed by the Secretary of the Treasury. *See also McDonnell Douglas*

Corp. v. United States, 75 Cust. Ct. 6 (1975), C.D. 4604, and General Note 20, HTSUS. Accordingly, § 7.3(a) should not be revised by substituting the word "may" with "shall."

Comment:

Proposed § 7.3(b)(2) provides that goods shall be considered the product of an insular possession if they "became a new and different article of commerce as a result of processing performed in the insular possession." Two comments suggested including "a change in name, character, or use, as a result of an operation including, but not limited to, assembly, manufacturing, and processing, performed in the insular possession." It was claimed that such a revision would clarify that a change in any one or more of the three criteria is sufficient to produce a new and different article of commerce. This revision would also clarify any ambiguity concerning the meaning of the word "processing", by using the word "operation" and providing three non-exhaustive examples (*i.e.*, assembly, manufacturing, and processing) to indicate that various methods can be used to bring about a substantial transformation.

Customs response:

Proposed § 7.3(b)(2) sets forth the basic substantial transformation rule. Customs does not believe that specific exemplars are necessary to establish how a new and different article of commerce is created because there are ample court cases and Customs rulings that explain the substantial transformation rule. Therefore, it is the opinion of Customs that specific exemplars are not appropriate for § 7.3(b)(2). However, for the sake of clarity, Customs believes that the word "processing" in § 7.3(b)(2) should be replaced with the words "production or manufacture" which more closely reflect the terminology used in General Note 3(a)(iv), HTSUS, and in proposed § 7.3(c)(2). Section 7.3(b)(2) as set forth below has been modified accordingly.

Comment:

Proposed § 7.3(b) should be revised to recognize that duty-free treatment under General Note 3(a)(iv) is to be afforded to products deemed to be products of an insular possession pursuant to U.S. Note 2, Subchapter II, Chapter 98, HTSUS (under which products of the United States returned to the United States after having been advanced in value or improved in condition abroad by any process of manufacture or other means, and imported articles assembled abroad in whole or in part from U.S. products, are to be treated as foreign articles), and which otherwise meet the requirements of General Note 3(a)(iv) (but are not necessarily substantially transformed in the insular possession). Specifically, this commenter recommended inclusion of the following as a third origin standard:

> (3) The goods were a product of the United States which were returned to the United States after having been advanced in value or improved in condition in an insular possession, or assembled in an

insular possession, pursuant to U.S. Note 2, Subchapter II, Chapter 98, HTSUS.

The commenter argued that this revision would clarify that goods which are not "wholly obtained or produced" or "substantially transformed" may still become a product of an insular possession and be eligible for duty-free treatment under General Note 3(a)(iv), as determined in Headquarters Ruling Letter (HRL) 557481 dated September 24, 1993, which reconsidered HRL 556381 dated March 2, 1991. In HRL 556381, Customs ruled that certain garments, produced on the U.S. mainland and screen printed or embroidered in the Virgin Islands using printing or embroidery materials produced on the U.S. mainland or Puerto Rico, were not eligible for duty-free treatment under General Note 3(a)(iv). Although no foreign-origin materials were employed in these operations, Customs held that the printed or embroidered garments were not eligible for duty-free treatment under General Note 3(a)(iv) because they were not "products of" the Virgin Islands and had not undergone a substantial transformation.

In HRL 557481, Customs reconsidered HRL 556381 and determined that, under the facts, the garments in question were products of the Virgin Islands and thus eligible for duty-free treatment under General Note 3(a)(iv). Specifically, Customs ruled that under 19 CFR 12.130(c) and U.S. Note 2, Subchapter II, Chapter 98, HTSUS, the U.S. good returned must be deemed a product of the non-U.S. jurisdiction in which they were advanced in value (*i.e.*, the U.S. Virgin Islands). Because the goods were a product of the Virgin Islands and otherwise met the requirements of General Note 3(a)(iv), they were entitled to duty-free treatment under that provision.

Customs response:

Customs cannot agree to the regulatory text change suggested by this commenter. Pursuant to T.D. 90–17, paragraph (c) of § 12.130, Customs Regulations (19 CFR 12.130), supersedes all other provisions of § 12.130 with regard to determining the origin of textile goods. This position, however, has not been extended to other goods on a general basis. *See* the May 5, 1995, notice of proposed rulemaking (discussed below in this document under the Other Changes to the Regulatory Texts section) in which Customs noted that it has reconsidered its previously stated position that U.S. Note 2(a), Subchapter II, Chapter 98, HTSUS, has application for general country of origin purposes. Therefore, the regulatory text change suggested by this commenter would have an impermissibly broad effect since it would apply to all goods rather than only to textile goods.

Comment:

It was suggested that § 7.3(c)(2), which twice uses the phrase "new and different article of commerce" to establish the principle of double substantial transformation, should be followed by the phrase "that is, one which underwent a change in name, character, or use." This would

ensure a consistent meaning of the term "new and different article of commerce" throughout § 7.3.

Customs response:

Customs disagrees, for the same reasons stated above in response to the comment regarding the use of exemplars to explain the creation of a new and different article. Customs also notes that the use of the words "new and different article of commerce" in § 7.3(c)(2), without further explanation, is consistent with the approach used in the GSP and CBI regulations (*see* 19 CFR 10.177(a)(2) and 19 CFR 10.195(a), respectively) which have not given rise to interpretive problems in this regard.

Comment:

General Note 3(a)(iv)(A) provides for the duty-free entry of goods from an insular possession containing foreign material up to 70 percent of their value, unless they are among the products not eligible for duty-free entry under the CBI, in which case duty-free entry is only allowed if the foreign materials do not exceed 50 percent of the value of the goods. General Note 3(a)(iv)(B) sets forth rules for identifying materials not to be considered as foreign (specifically, certain duty-free materials) for purposes of determining whether goods produced or manufactured in any such insular possession contain "foreign materials to the value of more than 70 percent".

One commenter suggested that § 7.3(c)(3), which defines certain materials which are not considered as "foreign materials" in determining the 70 percent foreign content limitation, is contrary to the legislative history of General Note 3(a)(iv) and its predecessor provisions and is contrary to longstanding practice, since it is not equally applicable to the 50 percent limitation. This commenter acknowledged that § 7.3(c)(3) is limited because General Note 3(a)(iv)(B) only refers to the "70 percent" value mentioned in paragraph (A); however, notwithstanding the strict language of paragraph (B), the commenter suggested that Congress intended that the rule regarding the use of duty-free foreign materials be equally applicable to products to which the 50 percent limitation applies. The commenter set forth the following analysis in support of this position:

Section 3 of the Act of March 3, 1917, Pub. L. 64–389, 39 Stat. 1133 (1917) ("the 1917 Act"), accorded duty-free treatment to products from the U.S. Virgin Islands as long as the value of the foreign materials did not exceed 20 percent. In 1950, the 1917 Act was amended to exclude from "foreign material" any material which could be entered into the United States free of duty. Pub. L. 81–766, 64 Stat. 784 (1950). The purpose of the legislation was to encourage the establishment of new industries in the U.S. Virgin Islands, thereby providing increased employment and revenues. S. Rep. No. 2368, 81st Cong., 2d Sess. 2 (1950). In 1954, the Customs Simplification Act, Pub. L. 83–768, title IV, section 401, 68 Stat. 1139 (1954), increased the foreign content limitation to 50 percent and continued the treatment of materials as not "foreign" if they could be entered into the United States free of duty.

General Headnote 3(a), Tariff Schedules of the United States (TSUS), effective August 31, 1963, continued the 50 percent foreign material limitation and the treatment of a material as not foreign if the material could be entered into the United States free of duty. Section 214 of the Caribbean Basin Economic Recovery Act (the CBI statute), Pub. L. 98–67 (1983), amended General Headnote 3(a), TSUS, by increasing the foreign materials value allowable in insular possession goods from 50 percent to 70 percent. However, for those goods that were not entitled to CBI preferential duty treatment, General Headnote 3(a), TSUS, was further amended to specify a 50 percent foreign materials value limitation for such products. In amending General Headnote 3(a), TSUS, to include the 70 percent foreign materials value limitation, Congress stated that it intended to "maintain the competitive position of Puerto Rico and the U.S. insular possessions which might otherwise be adversely affected by the Caribbean Basin Initiative." However, since CBI-exempt products "are excluded from duty-free treatment * * *, it is not necessary to increase the foreign content potential under general headnote 3(a) as an equalizing measure for the insular possessions * * *." H.R. Rep. No. 266, 98th Cong., 1st Sess. 22 (1983), *reprinted in* 1983 U.S. Code Cong. & Admin. News 645, 663.

Based on the above, this commenter suggested that under proposed § 7.3(c)(3), materials should also not be considered foreign materials for purposes of calculating the 50 percent foreign materials value limitation (in addition to the 70 percent value provision) if the materials may be entered into the U.S. free of duty. Therefore, despite the lack of any reference to the 50 percent value limitation in paragraph (B) of the present statutory provision, the only logical reading of paragraph (B), consistent with the congressional intent and longstanding practice, is to include in § 7.3(c)(3) the 50 percent foreign materials value reference contained in paragraph (A) of the statute.

This commenter further suggested that liberally construing this remedial statute will carry out the congressional intent. *See Atchison, Topeka and Santa Fe Railroad Co. v. Buell*, 480 U.S. 557, 561 (1987) (with a remedial statute, Congress adopts a "standard of liberal construction in order to accomplish [Congress'] objects."); *see also United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (the provision of a remedial statute "should be construed broadly to avoid frustrating the legislative purpose."). Furthermore, where the literal interpretation of a statute is inconsistent with the legislative intent, the words of the statute should give way to the legislative intent. *Florida Department of Banking v. Board of Governors*, 760 F.2d 1135, 1139 (11th Cir. 1985).

Therefore, this commenter suggested that § 7.3(c)(3) be revised to read as follows:

> (3) In the case of imported goods to which the 70 percent or 50 percent foreign materials value limitation applies as set forth in paragraph (a)(1)(i) of this section, a material which may be imported

into the customs territory of the United States from a foreign country and entered free of duty either:

Customs response:

Customs agrees with the commenter's suggestion to fill a gap in General Note 3(a)(iv)(B) by these regulations. Although paragraph (B) of General Note 3(a)(iv), HTSUS, clearly states that in regard to the 70 percent value, a material shall not be considered a "foreign material" if it may be imported into the United States and entered free of duty, that statutory provision does not address whether the same "foreign material" definition is applicable in the case of the 50 percent value limitation that applies to CBI-excluded goods under paragraph (A). However, based on a reading of General Note 3(a)(iv), HTSUS, and its predecessor provisions and the legislative history relating thereto, it appears that a material which could be entered into the United States free of duty has never been intended to be considered "foreign material" since the 1950 amendment of the 1917 Act.

As pointed out by the commenter and for the reasons stated in the comment, section 214(a) of the CBI statute amended General Headnote 3(a)(i), TSUS, by increasing the foreign materials value limitation from 50 percent to 70 percent for most goods and by retaining the 50 percent foreign materials value limitation for articles not eligible for CBI preferential treatment. However, while section 214(a) of the CBI statute also amended General Headnote 3(a)(ii), TSUS, (which referred to materials not considered foreign if they could be entered into the United States free of duty) by replacing the 50 percent value reference with a reference to 70 percent value, a reference to 50 percent value (to cover CBI-excluded goods) was not retained in this context for reasons that are not apparent from a reading of the applicable legislative history.

The above-mentioned Congressional intention of maintaining the competitive viability of the insular possessions is also consistent with the intent behind paragraphs (C), (D), and (E) of General Note 3(a)(iv), HTSUS, which were added when the GSP and CBI statutes and the Andean Trade Preference Act (ATPA) were enacted. The legislative history of what is now General Note 3(a)(iv)(C), HTSUS, indicates that the designation of beneficiary developing countries under section 502 of the GSP statute (19 U.S.C. 2462) was not intended to impair any benefits that insular possessions receive by reason of (former) General Headnote 3(a), TSUS. S. Rep. 93–1298, *reprinted in* 1974 U.S. Code Cong. Admin. New. 7186, 7352. "The Committee strongly believes that the products of U.S. insular possessions should under no circumstances be treated less advantageously than those of foreign countries. To the extent that such products would be entitled to better treatment under headnote 3(a), than under this title, they should receive treatment under 3(a)." *Id.*

If the "foreign material" definition in General Note 3(a)(iv)(B), HTSUS, is not applied to the 50 percent value limitation, the insular possessions will receive "no less favorable" treatment than CBI coun-

tries since the CBI-excluded goods are dutiable. However, before the enactment of the CBI, most goods from the insular possessions, including the "CBI-excluded" goods, received duty-free treatment if the 50 percent value was satisfied, to which the "foreign material" definition applied at that time. Therefore, it would seem that if Congress had intended to remove a benefit existing prior to the CBI, it would have indicated such intent.

Prior to the amendment of General Headnote 3(a), TSUS, by section 214 of the CBI statute, another noteworthy amendment to this provision was added by Pub. L. 94–88, title I, section 1, 2, 89 Stat. 433 (1975), which increased the 50 percent foreign materials value limitation to 70 percent with respect to watches and watch movements because of a setback in both production and employment in the insular possessions. When this 70 percent value for watches was inserted into subparagraph (i) of General Headnote 3(a), subparagraph (ii) thereof remained the same. Therefore, for purposes of applying the 50 percent value then in effect, materials were not considered foreign if they could be entered into the United States free of duty, but no reference was made to the increased 70 percent value limitation for watches. However, § 7.8(d) of the Customs Regulations (19 CFR 7.8(d)) was amended to refer both to the 50 percent value and to the 70 percent value for watches in the context of determining whether a material was a foreign material.

Therefore, it is the opinion of Customs that since the legislative history of General Note 3(a)(iv), HTSUS, does not discuss the omission of a reference to the 50 percent foreign materials value limitation for CBI-excluded products from paragraph (B), and because it is apparent that since 1950 materials were not considered "foreign materials" in all respects if they could be entered into the United States free of duty, the 50 percent foreign materials value limitation should be referred to in § 7.3(c)(3). Thus, Customs has determined it appropriate to amend the regulations not because General Note 3 is "remedial" legislation which must be liberally construed, as the commenter suggested, but rather because a strict construction of this special exemption leads Customs to conclude there is an inadvertent "gap" in that note which Congress did not clearly intend to result in a preclusion of favorable treatment. *See, e.g., United States v. Allen*, 163 U.S. 499, 503 (1896) (duty exemptions must be strictly construed as a general principle). The omission of the 50 percent value reference appears to have been an oversight stemming from the addition of the 70 percent value reference for watches rather than from a clear intention to remove a benefit in existence since 1950. There is also nothing in the legislative history relating to these amendments which specifically precludes more favorable treatment for an insular possession good under General Note 3(a)(iv), HTSUS, as compared to the GSP, CBI, or ATPA. In order to reflect this position and also simplify the text, § 7.3(c)(3) as set forth below has been modified by removing the "[I]n the case of * * *" clause which is no longer necessary in this regulatory context.

Comment:

The "direct shipment" standard on goods from U.S. insular possessions in proposed § 7.3(e) should be the same as in the case of the CBI, GSP, or ATPA, which allow goods to be transshipped through third countries under certain conditions. Otherwise, § 7.3(e) is contrary to the statutory mandate of General Note 3(a)(iv)(C), (D) and (E), HTSUS, that goods from insular possessions receive no less favorable duty treatment than GSP-, CBI-, or ATPA-eligible articles. The Customs rationale not to allow exceptions to direct movement to or from an insular possession through a foreign territory or country is not compelling since goods from all CBI countries may be shipped to the United States either by water or air without passing through intervening countries.

Customs response:

Customs agrees with the commenter on both points. First, none of the CBI countries are land-locked and thus shipment to the United States would not necessarily require transshipment through a foreign territory or country. Second, although General Note 3(a)(iv), HTSUS, is a more liberal provision than the GSP or CBI statutes or the ATPA, as already noted in this comment discussion, General Note 3(a)(iv)(C), (D) and (E) provide that, subject to the provisions of sections 503(b) and 504(c) of the GSP statute, section 213 of the CBI statute, and section 204 of the ATPA, goods imported from an insular possession of the United States shall receive duty treatment no less favorable than the treatment afforded such goods when they are imported from a beneficiary country under the GSP, CBI or ATPA. The GSP and CBI statutes and the ATPA require that the goods, in order to receive preferential duty treatment, meet certain qualifications including direct shipment from the beneficiary country into the United States. Sections 10.175 and 10.193 of the Customs Regulations (19 CFR 10.175 and 10.193) allow certain exceptions to the direct movement standard. Therefore, it appears that not allowing any exceptions to the strict direct shipment standard in the case of goods from insular possessions would be contrary to General Note 3(a)(iv)(C), (D), and (E), HTSUS.

Accordingly, § 7.3(e) as set forth below has been modified to include exceptions to the strict direct shipment standard and to provide for evidence of direct shipment. The modified text is based on the corresponding CBI regulatory provisions which appear to be more appropriate in an insular possession context than are the corresponding GSP regulations, but no reference is made to a waiver of evidence of direct shipment since simply having provision for not requiring submission of such evidence is a less burdensome approach.

Comment:

One comment concerned the use of the Certificate of Origin (Customs Form 3229) in the case of goods which incorporate a material described in General Note 3(a)(iv)(B)(2), HTSUS, which requires "adequate documentation * * * to show that the material has been incorporated into

such goods during the 18–month period after the date on which such material is imported into the insular possession." The commenter noted that the Certificate of Origin would require modification because it does not currently establish the use of the material within the 18–month period. The commenter also suggested that the district director be given discretion to waive the Certificate of Origin or to accept other documentation including a blanket statement that applies to several entries, since General Note 3(a)(iv)(B)(2), HTSUS, does not describe "adequate documentation" or specifically require a Certificate of Origin with each shipment.

Customs response:

Customs disagrees. While it was recognized in the notice of proposed rulemaking that the Certificate of Origin must be revised to reflect all current legal requirements under General Note 3(a)(iv), HTSUS, it is General Note 3(a)(iv)(B)(2), HTSUS, and not the Certificate of Origin that specifically establishes the requirement for submission of adequate documentation to show that the material was incorporated into the goods during the 18–month period after the date on which it was imported into the insular possession. While General Note 3(a)(iv)(B)(2), HTSUS, does not define "adequate documentation", it is the position of Customs that the use of the Certificate of Origin with which importers are already familiar, combined with the Customs officer's verification at the port of shipment, provide adequate assurance that the material described in General Note 3(a)(iv)(B)(2), HTSUS, was, in fact, incorporated in the goods within the specified 18–month period.

Comment:

One comment concerned proposed § 7.3(g) which, in accordance with existing law, allows warehouse withdrawals of goods for shipment to any insular possession without the payment of duty, or with a refund of duty if duties have been paid, but denies drawback of duties or internal revenue taxes on goods produced in the United States and shipped to any insular possession. This commenter suggested that § 7.3(g) should include the restrictions on shipments from foreign trade zones to insular possessions as specified in HRL 223828 dated July 1, 1992. That ruling held that merchandise transferred from a foreign trade zone for shipment to an insular possession is dutiable when transferred from the zone and that shipments from such a zone to an insular possession do not meet the exportation requirement of 19 U.S.C. 81c(a).

Customs response:

Customs disagrees. In *Rothschild & Co. v. United States*, 16 Ct. Cust. App. 422 (1929), it was held that the term "exportation" in section 557, Tariff Act of 1922 (the predecessor provision of section 557, Tariff Act of 1930), did not include shipments to Guam. As a result of this determination, hearings before the Ways and Means Committee of the House of Representatives in 1929 resulted in a recommendation that section 557 be amended to provide that merchandise may be withdrawn for ship-

ment to insular possessions without the payment of duties. *See Mitsubishi International Corp. v. United States*, 55 Cust. Ct. 319, C.D. 2597 (1965). Accordingly, section 557, Tariff Act of 1930, as amended (19 U.S.C. 1557), which permits merchandise to be entered for warehouse and withdrawn for shipment to Guam and other named possessions without payment of duties or, if duties have been paid, with a refund thereof, was the basis for 19 CFR 7.8(f) (the provision which was the basis for proposed § 7.3(g)).

The term "exportation" as defined by § 101.1 of the Customs Regulations (19 CFR 101.1), and as interpreted by the courts, is linked to a foreign country rather than to the Customs territory of the United States. Thus, shipments from the United States to a U.S. insular possession are not exports. Customs is of the opinion that there is no need to repeat this position in the regulatory provision at issue with respect to shipments to a U.S. insular possession from a foreign trade zone located within the United States.

Comment:

General Note 3(a)(iv), HTSUS, contains provisions (*i.e.*, paragraphs (C), (D) and (E)), which guarantee no less favorable duty treatment for goods from the insular possessions than for goods imported from GSP, CBI or ATPA beneficiary countries. It was suggested these paragraphs should at least be replicated in the regulations.

Customs response:

Customs disagrees. There is little use in simply duplicating General Notes 3(a)(iv)(C), (D), and (E), HTSUS, in the regulations where there is no need for an interpretation or other explanation of the statutory provision. It is clear that the statute, which controls, requires that goods from insular possessions be granted no less favorable duty treatment than goods imported from GSP, CBI, or ATPA beneficiary countries and the regulations set forth in this document reflect that result-oriented statutory principle.

Comment:

One comment questioned the conclusion in the notice of proposed rulemaking under the heading "Regulatory Flexibility Act" that there is no "major rule" since a substantial number of small entities may have significant economic impacts as a result of these amendments.

Customs response:

The regulatory amendments will not have a significant economic impact on a substantial number of small entities because these regulations primarily reflect statutory requirements and administrative practices that have been in place for many years for purposes of duty-free treatment of articles imported from insular possessions of the United States.

OTHER CHANGES TO THE REGULATORY TEXTS

In addition to the changes to the proposed regulatory texts discussed above in connection with the public comments, Customs has determined that a number of other changes to the proposed texts should be reflected in this final rule document.

Two of these changes involve proposed §§ 7.3(b)(1) and (c)(1) which referred, respectively, to goods and materials that were "wholly obtained or produced * * * within the meaning of § 102.1(e) of this chapter". These provisions were included in the proposed texts based on, and were identified in the document as being subject to final adoption of, an earlier proposal published in the Federal Register on September 25, 1991 (56 FR 48448) to set forth, in a new Part 102 of the Customs Regulations (19 CFR Part 102), uniform rules governing the determination of the country of origin of imported merchandise. Subsequently, on January 3, 1994, Customs published two documents in the Federal Register. The first document, published at 59 FR 110, consisted of T.D. 94–4 which amended the Customs Regulations on an interim basis to implement Annex 311 of the North American Free Trade Agreement (NAFTA); the majority of the T.D. 94–4 regulatory amendments involved the adoption of a new Part 102 of the Customs Regulations setting forth the NAFTA Marking Rules. The second document published on January 4, 1994 (at 59 FR 141) consisted of a notice of proposed rulemaking setting forth proposed amendments to the scope of interim Part 102, as well as to other provisions of the Customs Regulations, in order to establish within Part 102 uniform rules governing the determination of the country of origin of imported merchandise. The latter document replaced the September 25, 1991, uniform origin rules proposal and thus included, among other things, proposed conforming changes to the GSP and CBI regulations involving appropriate cross-references to the uniform rules that would be reflected in the amended Part 102 texts, but no proposed conforming changes to the Part 7 insular possession regulations were included since final action had not been taken on the regulatory proposals that are the subject of this document. On May 5, 1995, Customs published a document in the Federal Register (60 FR 22312) which set forth proposed changes to the interim regulatory amendments contained in T.D. 94–4 and which republished, with some changes, the January 4, 1994, uniform origin rule regulatory proposals, for purposes of further public comment.

On June 6, 1996, Customs published in the Federal Register (61 FR 28932) T.D. 96–48 which adopted as a final rule, with some modifications, the NAFTA Marking Rules and other interim regulatory amendments published as T.D. 94–4 on January 3, 1994, but which did not adopt as a final rule the May 5, 1995, proposals regarding the uniform origin rule concept (including the proposed amendments to the GSP and CBI regulations). The Background portion of T.D. 96–48 stated (at 61 FR 28933) that Customs had decided that the proposal to extend the Part 102 regulations to all trade "should remain under consideration

for implementation at a later date." In the light of this deferral of the decision on whether to apply a uniform method of determining origin to all trade, it would not be appropriate in this document to adopt the texts of §§ 7.3(b)(1) and (c)(1) as proposed. Accordingly, §§ 7.3(b)(1) and (c)(1) as set forth below have been modified to remove the references to the Part 102 regulation and, similar to the present GSP and CBI regulatory approach, to refer instead to goods and materials that are "wholly the growth or product" of the insular possession. If in the future a final decision is taken to adopt the proposed uniform method of determining origin for all trade, the necessary regulatory amendments will include appropriate changes to the text of § 7.3.

Finally, in order to align on technical corrections made to the Customs Regulations in T.D. 95–78 (published in the Federal Register on September 27, 1995, at 60 FR 50020) to reflect the new organizational structure of Customs, § 7.3 as set forth below has been modified by inserting "port director" in place of each reference to "district director".

Conclusion

Accordingly, based on the comments received and the analysis of those comments as set forth above, and after further review of this matter, Customs believes that the proposed regulatory amendments should be adopted as a final rule with certain changes thereto as discussed above and as set forth below. This document also includes an appropriate update of the list of information collection approvals contained in § 178.2 of the Customs Regulations (19 CFR 178.2).

Executive Order 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. The amendments primarily reflect statutory requirements and administrative practices that have been in place for many years and, thus, any economic impact arising out of these amendments would be negligible at best. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Paperwork Reduction Act

The collection of information contained in this final rule has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1515–0200. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The collection of information in this final rule is in § 7.3. This information is required in connection with claims for duty-free treatment

under General Note 3(a)(iv), HTSUS. This information will be used by Customs to determine whether goods imported from insular possessions are entitled to duty-free entry under that General Note. The collection of information is required to obtain a benefit. The likely respondents are business organizations including importers, exporters, and manufacturers.

The estimated average burden associated with the collection of information in this final rule is 11.3 hours per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Paperwork Management Branch, Room 6316, 1301 Constitution Avenue, N.W., Washington, D.C. 20229, and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 7

Customs duties and inspection, Imports, Insular possessions.

19 CFR Part 10

Customs duties and inspection, Imports.

19 CFR Part 148

Customs duties and inspection, Imports, Personal exemptions.

19 CFR Part 178

Administrative practice and procedure, Exports, Imports, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

Accordingly, for the reasons stated in the preamble, Parts 7, 10, 148 and 178, Customs Regulations (19 CFR Parts 7, 10, 148 and 178), are amended as set forth below:

PART 7—CUSTOMS RELATIONS WITH INSULAR POSSESSIONS AND GUANTANAMO BAY NAVAL STATION

1. The authority citation for Part 7 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624; 48 U.S.C. 1406i.

2. Sections 7.2 and 7.3 are added to read as follows:

§ 7.2 Insular possessions of the United States other than Puerto Rico.

(a) Insular possessions of the United States other than Puerto Rico are also American territory but, because those insular possessions are

outside the customs territory of the United States, goods imported therefrom are subject to the rates of duty set forth in column 1 of the Harmonized Tariff Schedule of the United States (HTSUS) except as otherwise provided in § 7.3 or in part 148 of this chapter. The principal such insular possessions are the U.S. Virgin Islands, Guam, American Samoa, Wake Island, Midway Islands, and Johnston Atoll. Pursuant to section 603(c) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America, Public Law 94–241, 90 Stat. 263, 270, goods imported from the Commonwealth of the Northern Mariana Islands are entitled to the same tariff treatment as imports from Guam and thus are also subject to the provisions of § 7.3 and of part 148 of this chapter.

(b) Importations into Guam, American Samoa, Wake Island, Midway Islands, Johnston Atoll, and the Commonwealth of the Northern Mariana Islands are not governed by the Tariff Act of 1930, as amended, or the regulations contained in this chapter. The customs administration of Guam is under the Government of Guam. The customs administration of American Samoa is under the Government of American Samoa. The customs administration of Wake Island is under the jurisdiction of the Department of the Air Force (General Counsel). The customs administration of Midway Islands is under the jurisdiction of the Department of the Navy. There is no customs authority on Johnston Atoll, which is under the operational control of the Defense Nuclear Agency. The customs administration of the Commonwealth of the Northern Mariana Islands is under the Government of the Commonwealth.

(c) The Secretary of the Treasury administers the customs laws of the U.S. Virgin Islands through the United States Customs Service. The importation of goods into the U.S. Virgin Islands is governed by Virgin Islands law; however, in situations where there is no applicable Virgin Islands law or no U.S. law specifically made applicable to the Virgin Islands, U.S. laws and regulations shall be used as a guide and be complied with as nearly as possible. Tariff classification of, and rates of duty applicable to, goods imported into the U.S. Virgin Islands are established by the Virgin Islands legislature.

§ 7.3 Duty-free treatment of goods imported from insular possessions of the United States other than Puerto Rico.

(a) *General.* Under the provisions of General Note 3(a)(iv), Harmonized Tariff Schedule of the United States (HTSUS), the following goods may be eligible for duty-free treatment when imported into the customs territory of the United States from an insular possession of the United States:

(1) Except as provided in Additional U.S. Note 5 to Chapter 91, HTSUS, and except as provided in Additional U.S. Note 2 to Chapter 96, HTSUS, and except as provided in section 423 of the Tax Reform Act of 1986, as amended (19 U.S.C. 2703 note), goods which are the growth or product of any such insular possession, and goods which were manufactured or produced in any such insular possession from materials that

were the growth, product or manufacture of any such insular possession or of the customs territory of the United States, or of both, provided that such goods:

(i) Do not contain foreign materials valued at either more than 70 percent of the total value of the goods or, in the case of goods described in section 213(b) of the Caribbean Basin Economic Recovery Act (19 U.S.C. 2703(b)), more than 50 percent of the total value of the goods; and

(ii) Come to the customs territory of the United States directly from any such insular possession; and

(2) Goods previously imported into the customs territory of the United States with payment of all applicable duties and taxes imposed upon or by reason of importation, provided that:

(i) The goods were shipped from the United States directly to the insular possession and are returned from the insular possession to the United States by direct shipment; and

(ii) There was no remission, refund or drawback of such duties or taxes in connection with the shipment of the goods from the United States to the insular possession.

(b) *Origin of goods*. For purposes of this section, goods shall be considered to be the growth or product of, or manufactured or produced in, an insular possession if:

(1) The goods are wholly the growth or product of the insular possession; or

(2) The goods became a new and different article of commerce as a result of production or manufacture performed in the insular possession.

(c) *Foreign materials*. For purposes of this section, the term "foreign materials" covers any material incorporated in goods described in paragraph (b)(2) of this section other than:

(1) A material which was wholly the growth or product of an insular possession or of the customs territory of the United States;

(2) A material which was substantially transformed in an insular possession or in the customs territory of the United States into a new and different article of commerce which was then used in an insular possession in the production or manufacture of a new and different article which is shipped directly to the United States; or

(3) A material which may be imported into the customs territory of the United States from a foreign country and entered free of duty either:

(i) At the time the goods which incorporate the material are entered; or

(ii) At the time the material is imported into the insular possession, provided that the material was incorporated into the goods during the 18-month period after the date on which the material was imported into the insular possession.

(d) *Foreign materials value limitation*. For purposes of this section, the determination of whether goods contain foreign materials valued at more than 70 or 50 percent of the total value of the goods shall be made based on a comparison between:

(1) The landed cost of the foreign materials, consisting of:

(i) The manufacturer's actual cost for the materials or, where a material is provided to the manufacturer without charge or at less than fair market value, the sum of all expenses incurred in the growth, production, or manufacture of the material, including general expenses, plus an amount for profit; and

(ii) The cost of transporting those materials to the insular possession, but excluding any duties or taxes assessed on the materials by the insular possession and any charges which may accrue after landing; and

(2) The final appraised value of the goods imported into the customs territory of the United States, as determined in accordance with section 402 of the Tariff Act of 1930, as amended (19 U.S.C. 1401a).

(e) *Direct shipment*—(1) *General*. For purposes of this section, goods shall be considered to come to the United States directly from an insular possession, or to be shipped from the United States directly to an insular possession and returned from the insular possession to the United States by direct shipment, only if:

(i) The goods proceed directly to or from the insular possession without passing through any foreign territory or country;

(ii) The goods proceed to or from the insular possession through a foreign territory or country, the goods do not enter into the commerce of the foreign territory or country while en route to the insular possession or the United States, and the invoices, bills of lading, and other shipping documents show the insular possession or the United States as the final destination; or

(iii) The goods proceed to or from the insular possession through a foreign territory or country, the invoices and other shipping documents do not show the insular possession or the United States as the final destination, and the goods:

(A) Remained under the control of the customs authority of the foreign territory or country;

(B) Did not enter into the commerce of the foreign territory or country except for the purpose of sale other than at retail, and the port director is satisfied that the importation into the insular possession or the United States results from the original commercial transaction between the importer and the producer or the latter's sales agent; and

(C) Were not subjected to operations in the foreign territory or country other than loading and unloading and other activities necessary to preserve the goods in good condition.

(2) *Evidence of direct shipment*. The port director may require that appropriate shipping papers, invoices, or other documents be submitted within 60 days of the date of entry as evidence that the goods were shipped to the United States directly from an insular possession or shipped from the United States directly to an insular possession and returned from the insular possession to the United States by direct shipment within the meaning of paragraph (e)(1) of this section, and such evidence of direct shipment shall be subject to such verification as

deemed necessary by the port director. Evidence of direct shipment shall not be required when the port director is otherwise satisfied, taking into consideration the kind and value of the merchandise, that the goods qualify for duty-free treatment under General Note 3(a)(iv), HTSUS, and paragraph (a) of this section.

(f) *Documentation.* (1) When goods are sought to be admitted free of duty as provided in paragraph (a)(1) of this section, there shall be filed with the entry/entry summary a properly completed certificate of origin on Customs Form 3229, signed by the chief or assistant chief customs officer or other official responsible for customs administration at the port of shipment, showing that the goods comply with the requirements for duty-free entry set forth in paragraph (a)(1) of this section. Except in the case of goods which incorporate a material described in paragraph (c)(3)(ii) of this section, a certificate of origin shall not be required for any shipment eligible for informal entry under § 143.21 of this chapter or in any case where the port director is otherwise satisfied that the goods qualify for duty-free treatment under paragraph (a)(1) of this section.

(2) When goods in a shipment not eligible for informal entry under § 143.21 of this chapter are sought to be admitted free of duty as provided in paragraph (a)(2) of this section, the following declarations shall be filed with the entry/entry summary unless the port director is satisfied by reason of the nature of the goods or otherwise that the goods qualify for such duty-free entry:

(i) A declaration by the shipper in the insular possession in substantially the following form:

I, _____ (name) of _____ (organization) do hereby declare that to the best of my knowledge and belief the goods identified below were sent directly from the United States on _____, 19__, to _____ (name) of _____ (organization) on _____ (insular possession) via the _____ (name of carrier) and that the goods remained in said insular possession until shipped by me directly to the United States via the _____ (name of carrier) on _____, 19__.

Marks	Numbers	Quantity	Description	Value

Dated at _____, this _____ day of _____, 19__.

Signature: _____

(ii) A declaration by the importer in the United States in substantially the following form:

I, _____ (name), of _____ (organization) declare that the (above) (attached) declaration by the shipper in the insular possession is true and correct to the best of my knowledge and belief,

that the goods in question were previously imported into the customs territory of the United States and were shipped to the insular possession from the United States without remission, refund or drawback of any duties or taxes paid in connection with that prior importation, and that the goods arrived in the United States directly from the insular possession via the _____ (name of carrier) on _____, 19__.

_____ _____
(Date) (Signature

(g) *Warehouse withdrawals; drawback.* Merchandise may be withdrawn from a bonded warehouse under section 557 of the Tariff Act of 1930, as amended (19 U.S.C. 1557), for shipment to any insular possession of the United States other than Puerto Rico without payment of duty, or with a refund of duty if the duties have been paid, in like manner as for exportation to foreign countries. No drawback may be allowed under section 313 of the Tariff Act of 1930, as amended (19 U.S.C. 1313), on goods manufactured or produced in the United States and shipped to any insular possession. No drawback of internal-revenue tax is allowable under 19 U.S.C. 1313 on goods manufactured or produced in the United States with the use of domestic tax-paid alcohol and shipped to Wake Island, Midway Islands or Johnston Atoll.

3. Section 7.8 and footnote 5 thereto are removed.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314.

* * * * * * *

2. Section 10.181 is redesignated as § 7.4, and newly redesignated § 7.4 is amended as follows:

a. Paragraph (b) is amended by adding the word "the" before the words "Department of Commerce".

b. Paragraph (g), second sentence, is amended by removing the words "Form ITA–360" and adding, in their place, the words "Form ITA–361".

c. Paragraph (h) is amended by removing the word "Department" and adding, in its place, the word "Departments".

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. The authority citation for Part 148 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1496, 1498, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 20, Harmonized Tariff Schedule of the United States);

* * * * * * *

Sections 148.43, 148.51, 148.63, 148.64, 148.74 also issued under 19 U.S.C. 1321;

* * * * * * *

2. Section 148.2(b), first sentence, is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,".

3. Section 148.12(b)(1)(i) is revised to read as follows:

§ 148.12 Oral declarations.

* * * * * * *

(b) * * *

(1) * * *

(i) The aggregate fair retail value in the country of acquisition of all accompanying articles acquired abroad by him and of alterations and dutiable repairs made abroad to personal and household effects taken out and brought back by him does not exceed:

(A) $400; or

(B) $600 in the case of a direct arrival from a beneficiary country as defined in § 10.191(b)(1) of this chapter, not more than $400 of which shall have been acquired elsewhere than in beneficiary countries; or

(C) $1,200 in the case of a direct or indirect arrival from American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands of the United States, not more than $400 of which shall have been acquired elsewhere than in such locations except that up to $600 of which may have been acquired in one or more beneficiary countries as defined in § 10.191(b)(1) of this chapter;

* * * * * * *

4. Sections 148.17(b) and (c) are amended by removing the words "$400 or $800" and adding, in their place, the words "$400, $600 or $1,200".

5. Section 148.31(a), first sentence, is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,".

6. Section 148.31(b) is amended by removing the words "$400 or $800" and adding, in their place, the words "$400, $600 or $1,200".

7. Section 148.32(d)(2) is amended by removing the words "$400 or $800" and adding, in their place, the words "$400, $600 or $1,200".

8. Section 148.33 is amended by revising paragraphs (a), (b), (d) and (f) to read as follows:

§ 148.33 Articles acquired abroad.

(a) *Exemption.* Each returning resident is entitled to bring in free of duty and internal revenue tax under subheadings 9804.00.65, 9804.00.70 and 9804.00.72, and Chapter 98, U.S. Note 3, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202), articles for his personal or household use which were purchased or otherwise acquired abroad merely as an incident of the foreign journey from which he is returning, subject to the limitations and conditions set forth in this sec-

tion and §§ 148.34–148.38. The aggregate fair retail value in the country of acquisition of such articles for personal and household use shall not exceed:

(1) $400, and provided that the articles accompany the returning resident;

(2) Whether or not the articles accompany the returning resident, $600 in the case of a direct arrival from a beneficiary country as defined in § 10.191(b)(1) of this chapter, not more than $400 of which shall have been acquired elsewhere than in beneficiary countries; or

(3) Whether or not the articles accompany the returning resident, $1,200 in the case of a direct or indirect arrival from American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands of the United States, not more than $400 of which shall have been acquired elsewhere than in such locations except that up to $600 of which may have been acquired in one or more beneficiary countries as defined in § 10.191(b)(1) of this chapter.

(b) *Application to articles of highest rate of duty.* The $400, $600 or $1,200 exemption shall be applied to the aggregate fair retail value in the country of acquisition of the articles acquired abroad which are subject to the highest rates of duty. If an internal revenue tax is applicable, it shall be combined with the duty in determining which rates are highest.

* * * * * * *

(d) *Tobacco products and alcoholic beverages.* Cigars, cigarettes, manufactured tobacco, and alcoholic beverages may be included in the exemption to which a returning resident is entitled, with the following limits:

(1) No more than 200 cigarettes and 100 cigars may be included, except that in the case of American Samoa, Guam, the Commonwealth of the Northern Mariana Islands and the Virgin Islands of the United States the cigarette limit is 1,000, not more than 200 of which shall have been acquired elsewhere than in such locations;

(2) No alcoholic beverages shall be included in the case of an individual who has not attained the age of 21; and

(3) No more than 1 liter of alcoholic beverages may be included, except that:

(i) An individual returning directly or indirectly from American Samoa, Guam, the Commonwealth of the Northern Mariana Islands or the Virgin Islands of the United States may include in the exemption not more than 5 liters of alcoholic beverages, not more than 1 liter of which shall have been acquired elsewhere than in such locations and not more than 4 liters of which shall have been produced elsewhere than in such locations; and

(ii) An individual returning directly from a beneficiary country as defined in § 10.191(b)(1) of this chapter may include in the exemption not more than 2 liters of alcoholic beverages if at least 1 liter is the product of one or more beneficiary countries.

* * * * * * *

(f) *Remainder not applicable to subsequent journey.* A returning resident who has received a total exemption of less than the $400, $600 or $1,200 maximum in connection with his return from one journey is not entitled to apply the unused portion of that maximum amount to articles acquired abroad on a subsequent journey.

9. Section 148.34(a) is amended by removing the words "$400 or $800" wherever they appear and adding, in their place, the words "$400, $600 or $1,200".

10. Section 148.35 is amended by revising paragraphs (a) and (b) to read as follows:

§ 148.35 Length of stay for exemption of articles acquired abroad.

(a) *Required for allowance of $400, $600 or $1,200 exemption.* Except as otherwise provided in this paragraph or in paragraph (b) of this section, the $400, $600 or $1,200 exemption for articles acquired abroad shall not be allowed unless the returning resident has remained beyond the territorial limits of the United States for a period of not less than 48 hours. The $400 exemption may be allowed on articles acquired abroad by a returning resident arriving directly from Mexico without regard to the length of time the person has remained outside the territorial limits of the United States.

(b) *Not required for allowance of $1,200 exemption on return from Virgin Islands.* The $1,200 exemption applicable in the case of the arrival of a returning resident directly or indirectly from the Virgin Islands of the United States may be allowed without regard to the length of time such person has remained outside the territorial limits of the United States.

* * * * * * *

11. Section 148.36 is amended by removing the words "$400 or $800" wherever they appear and adding, in their place, the words "$400, $600 or $1,200".

12. Section 148.37 is amended by removing the words "$400 or $800" wherever they appear and adding, in their place, the words "$400, $600 or $1,200".

13. Section 148.38 is amended by removing the words "$400 or $800" and adding, in their place, the words "$400, $600 or $1,200".

14. Section 148.51 is amended by revising paragraph (a)(2) to read as follows:

§ 148.51 Special exemption for personal or household articles.

(a) * * *

(2) A returning resident who is not entitled to the $400, $600 or $1,200 exemption for articles acquired abroad under subheading 9804.00.65, 9804.00.70 or 9804.00.72, HTSUS (see Subpart D of this part).

* * * * * * *

15. Section 148.64(a), first sentence, is amended by removing the words "subheadings 9804.00.30 or 9804.00.70," and adding, in their place, the words "subheading 9804.00.30, 9804.00.65, 9804.00.70 or 9804.00.72,".

16. Section 148.74(c)(3) is amended by removing the words "subheading 9804.00.65 and 9804.00.70," and adding, in their place, the words "subheading 9804.00.65, 9804.00.70 or 9804.00.72,".

17. In § 148.101, the sixth sentence is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,"; and example 2 is amended by removing the figure "$2,900" in the example text and adding, in its place, the figure "$4,900", by removing the figure "$800" wherever it appears in the example text and table and adding, in its place, the figure "$1,200", by removing the figure "$1,600" in the table column headed "Fair retail value" and adding, in its place, the figure "$2,400", by removing the figure "$4,100" in the table column headed "Fair retail value" and adding, in its place, the figure "$4,900", and by removing the figure "$1,00" in the table column headed "Duty" and adding, in its place, the figure "$100".

18. Section 148.102 is amended by revising paragraphs (a) and (b) to read as follows:

§ 148.102 Flat rate of duty.

(a) *Generally.* The rate of duty on articles accompanying any person, including a crewmember, arriving in the United States (exclusive of duty-free articles and articles acquired in Canada, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands of the United States) shall be 10 percent of the fair retail value in the country of acquisition.

(b) *American Samoa, Guam, the Northern Mariana Islands, and the Virgin Islands.* The rate of duty on articles accompanying any person, including a crewmember, arriving in the United States directly or indirectly from American Samoa, Guam, the Commonwealth of the Northern Mariana Islands or the Virgin Islands of the United States (exclusive of duty-free articles), acquired in these locations as an incident of the person's physical presence there, shall be 5 percent of the fair retail value in the location in which acquired.

* * * * * * *

19. Section 148.104(c) is amended by removing the figure "$800" and adding, in its place, the figure "$1,000".

20. The heading to Subpart K is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,".

21. In § 148.110, the first paragraph is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,"; and the second paragraph is amended by adding after "Guam" the words ", the Commonwealth of the Northern Mariana Islands,".

22. In § 148.111, the introductory text is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Is-

lands,"; and paragraph (a) is amended by removing the figure "$800" and adding, in its place, the figure "$1,200".

23. Section 148.113(a), first sentence, is amended by removing the figure "800" and adding, in its place, the figure "$1,200".

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1624; 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by adding a new listing to the table in numerical order to read as follows:

§ 178.2 Listing of OMB control numbers.

19 CFR Section	Description	OMB Control No.
* * *	* * *	* *
§ 7.3	Claim for duty-free entry of goods imported from U.S. insular possessions.	1515–0055
* * *	* * *	* *

GEORGE J. WEISE,
Commissioner of Customs.

Approved: May 27, 1997.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, September 3, 1997 (62 FR 46433)]

(T.D. 97–76)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List for August 1997

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): None.

Greece drachma:

August 1, 1997	$0.003441
August 2, 1997	.003441
August 3, 1997	.003441
August 4, 1997	.003436
August 5, 1997	.003411
August 6, 1997	.003406
August 7, 1997	.003418
August 8, 1997	.003460
August 9, 1997	.003460
August 10, 1997	.003460
August 11, 1997	.003437
August 12, 1997	.003425
August 13, 1997	.003464
August 14, 1997	.003461
August 15, 1997	.003497
August 16, 1997	.003497
August 17, 1997	.003497
August 18, 1997	.003497
August 19, 1997	.003467
August 20, 1997	.003439
August 21, 1997	.003460
August 22, 1997	.003509
August 23, 1997	.003509
August 24, 1997	.003509
August 25, 1997	.003493
August 26, 1997	.003535
August 27, 1997	.003511
August 28, 1997	.003802
August 29, 1997	.003521
August 30, 1997	.003521
August 31, 1997	.003521

South Korea won:

August 1, 1997	$0.001122
August 2, 1997	.001122
August 3, 1997	.001122
August 4, 1997	.001122
August 5, 1997	.001120
August 6, 1997	.001438
August 7, 1997	.001117
August 8, 1997	.001115
August 9, 1997	.001115

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 1997 (continued):

South Korea won (continued):

August 10, 1997	$0.001115
August 11, 1997	.001117
August 12, 1997	.001115
August 13, 1997	.001115
August 14, 1997	.001115
August 15, 1997	.001115
August 16, 1997	.001115
August 17, 1997	.001115
August 18, 1997	.001110
August 19, 1997	.001110
August 20, 1997	.001110
August 21, 1997	.001112
August 22, 1997	.001109
August 23, 1997	.001109
August 24, 1997	.001109
August 25, 1997	.001103
August 26, 1997	.001109
August 27, 1997	.001105
August 28, 1997	.001105
August 29, 1997	.001105
August 30, 1997	.001105
August 31, 1997	.001105

Taiwan N.T. dollar:

August 1, 1997	$0.034602
August 2, 1997	.034602
August 3, 1997	.034602
August 4, 1997	.034783
August 5, 1997	.034783
August 6, 1997	.034783
August 7, 1997	.034722
August 8, 1997	.034662
August 9, 1997	.034662
August 10, 1997	.034662
August 11, 1997	.034662
August 12, 1997	.034542
August 13, 1997	.034662
August 14, 1997	.034662
August 15, 1997	.034602
August 16, 1997	.034602
August 17, 1997	.034602
August 18, 1997	.034722
August 19, 1997	.034722
August 20, 1997	.034662
August 21, 1997	.034662
August 22, 1997	.034722
August 23, 1997	.034722
August 24, 1997	.034722
August 25, 1997	.034722
August 26, 1997	.034722
August 27, 1997	.034746

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 1997 (continued):

Taiwan N.T. dollar (continued):

August 28, 1997	$0.034722
August 29, 1997	.034698
August 30, 1997	.034698
August 31, 1997	.034698

Dated: September 2, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 97–77)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR AUGUST 1997

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 97–58 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): None.

Austria schilling:

August 1, 1997	$0.076278
August 2, 1997	.076278
August 3, 1997	.076278
August 4, 1997	.076237
August 5, 1997	.075569
August 6, 1997	.075637
August 7, 1997	.076002
August 8, 1997	.077018
August 9, 1997	.077018
August 10, 1997	.077018
August 11, 1997	.076517
August 12, 1997	.076092
August 13, 1997	.077447
August 14, 1997	.077143
August 19, 1997	.077166
August 20, 1997	.076570
August 21, 1997	.077083

FOREIGN CURRENCIES—Variances from quarterly rates for August 1997 (continued):

Belgium franc:	
August 1, 1997	$0.025867
August 2, 1997	.025867
August 3, 1997	.025867
August 4, 1997	.025967
August 5, 1997	.025760
August 6, 1997	.025760
August 7, 1997	.025860
August 8, 1997	.026178
August 9, 1997	.026178
August 10, 1997	.026178
August 11, 1997	.026089
August 12, 1997	.025940
August 13, 1997	.026385
August 14, 1997	.026274
August 19, 1997	.026288
August 20, 1997	.026089
August 21, 1997	.026267
Denmark krone:	
August 1, 1997	$0.140795
August 2, 1997	.140795
August 3, 1997	.140795
August 4, 1997	.140766
August 5, 1997	.139573
August 6, 1997	.139723
August 7, 1997	.140252
August 8, 1997	.142177
August 9, 1997	.142177
August 10, 1997	.142177
August 11, 1997	.141363
August 12, 1997	.140617
August 13, 1997	.143041
August 14, 1997	.142450
August 19, 1997	.142572
August 20, 1997	.141403
August 21, 1997	.142268
Finland markka:	
August 1, 1997	$0.179888
August 2, 1997	.179888
August 3, 1997	.179888
August 4, 1997	.179921
August 5, 1997	.178699
August 6, 1997	.178571
August 7, 1997	.178683
August 8, 1997	.181357
August 9, 1997	.181357
August 10, 1997	.181357
August 11, 1997	.180310
August 12, 1997	.179019
August 13, 1997	.182083
August 14, 1997	.181045
August 15, 1997	.182983
August 16, 1997	.182983
August 17, 1997	.182983
August 18, 1997	.183150

FOREIGN CURRENCIES—Variances from quarterly rates for August 1997 (continued):

Finland markka (continued):

August 19, 1997	$0.181389
August 20, 1997	.180489
August 21, 1997	.181587

France franc:

August 1, 1997	$0.159193
August 2, 1997	.159193
August 3, 1997	.159193
August 4, 1997	.158894
August 5, 1997	.157542
August 6, 1997	.157503
August 7, 1997	.158695
August 8, 1997	.160694
August 9, 1997	.160694
August 10, 1997	.160694
August 11, 1997	.159757
August 12, 1997	.158919
August 13, 1997	.161721
August 14, 1997	.160979
August 19, 1997	.161160
August 20, 1997	.159872
August 21, 1997	.160979

Germany deutsche mark:

August 1, 1997	$0.536308
August 2, 1997	.536308
August 3, 1997	.536308
August 4, 1997	.536337
August 5, 1997	.531632
August 6, 1997	.532311
August 7, 1997	.534702
August 8, 1997	.541771
August 9, 1997	.541771
August 10, 1997	.541771
August 11, 1997	.538561
August 12, 1997	.535475
August 13, 1997	.544959
August 14, 1997	.542977
August 19, 1997	.542800
August 20, 1997	.538735
August 21, 1997	.542711

Ireland pound:

August 5, 1997	$1.434500
August 6, 1997	1.434000
August 7, 1997	1.430800
August 11, 1997	1.435000
August 12, 1997	1.430000
August 20, 1997	1.439500

Italy lira:

August 1, 1997	$0.000550
August 2, 1997	.000550
August 3, 1997	.000550
August 4, 1997	.000548
August 5, 1997	.000544

FOREIGN CURRENCIES—Variances from quarterly rates for August 1997 (continued):

Italy lira (continued):	
August 6, 1997	$0.000543
August 7, 1997	.000546
August 8, 1997	.000555
August 9, 1997	.000555
August 10, 1997	.000555
August 11, 1997	.000552
August 12, 1997	.000549
August 13, 1997	.000557
August 14, 1997	.000556
August 15, 1997	.000561
August 16, 1997	.000561
August 17, 1997	.000561
August 18, 1997	.000561
August 19, 1997	.000557
August 20, 1997	.000553
August 21, 1997	.000557
Malaysia dollar:	
August 8, 1997	$0.370370
August 9, 1997	.370370
August 10, 1997	.370370
August 11, 1997	.364232
August 12, 1997	.359324
August 13, 1997	.360036
August 14, 1997	.359260
August 15, 1997	.359066
August 16, 1997	.359066
August 17, 1997	.359066
August 18, 1997	.356824
August 19, 1997	.358423
August 20, 1997	.359712
August 21, 1997	.362319
August 22, 1997	.360360
August 23, 1997	.360360
August 24, 1997	.360360
August 25, 1997	.360555
August 26, 1997	.358551
August 27, 1997	.352237
August 28, 1997	.341006
August 29, 1997	.342466
August 30, 1997	.342466
August 31, 1997	.342466
Netherlands guilder:	
August 1, 1997	$0.476417
August 2, 1997	.476417
August 3, 1997	.476417
August 4, 1997	.476190
August 5, 1997	.472210
August 6, 1997	.472367
August 7, 1997	.474406
August 8, 1997	.480746
August 9, 1997	.480746
August 10, 1997	.480746
August 11, 1997	.478126
August 12, 1997	.475398

FOREIGN CURRENCIES—Variances from quarterly rates for August 1997 (continued):

Netherlands guilder (continued):

August 13, 1997	$0.483676
August 14, 1997	.481812
August 19, 1997	.482160
August 20, 1997	.478354
August 21, 1997	.481812

New Zealand dollar:

August 1, 1997	$0.643300
August 2, 1997	.643300
August 3, 1997	.643300
August 4, 1997	.643000
August 6, 1997	.639300
August 7, 1997	.638500
August 8, 1997	.637300
August 9, 1997	.637300
August 10, 1997	.637300
August 11, 1997	.641800
August 12, 1997	.638000
August 13, 1997	.641400
August 14, 1997	.641500
August 15, 1997	.642100
August 16, 1997	.642100
August 17, 1997	.642100
August 18, 1997	.643500
August 20, 1997	.640300
August 21, 1997	.640300
August 27, 1997	.643500
August 28, 1997	.643300
August 29, 1997	.638500
August 30, 1997	.638500
August 31, 1997	.638500

Norway krone:

August 1, 1997	$0.129676
August 2, 1997	.129676
August 3, 1997	.129676
August 4, 1997	.129887
August 5, 1997	.128926
August 6, 1997	.129316
August 7, 1997	.130141
August 12, 1997	.130259
August 20, 1997	.129416
August 21, 1997	.130081

Portugal escudo:

August 1, 1997	$0.005305
August 2, 1997	.005305
August 3, 1997	.005305
August 4, 1997	.005294
August 5, 1997	.005252
August 6, 1997	.005257
August 7, 1997	.005281
August 8, 1997	.005359
August 9, 1997	.005359
August 10, 1997	.005359
August 11, 1997	.005316

FOREIGN CURRENCIES—Variances from quarterly rates for August 1997 (continued):

Portugal escudo (continued):

August 12, 1997	$0.005294
August 13, 1997	.005376
August 14, 1997	.005351
August 15, 1997	.005402
August 16, 1997	.005402
August 17, 1997	.005402
August 18, 1997	.005407
August 19, 1997	.005359
August 20, 1997	.005316
August 21, 1997	.005350

Singapore dollar:

August 12, 1997	$0.662471
August 13, 1997	.664011
August 14, 1997	.658111
August 15, 1997	.659196
August 16, 1997	.659196
August 17, 1997	.659196
August 18, 1997	.658979
August 19, 1997	.661594
August 20, 1997	.663570
August 27, 1997	.659196
August 28, 1997	.655093
August 29, 1997	.660066
August 30, 1997	.660066
August 31, 1997	.660066

Spain peseta:

August 1, 1997	$0.006365
August 2, 1997	.006365
August 3, 1997	.006365
August 4, 1997	.006348
August 5, 1997	.006299
August 6, 1997	.006297
August 7, 1997	.006327
August 8, 1997	.006410
August 9, 1997	.006410
August 10, 1997	.006410
August 11, 1997	.006385
August 12, 1997	.006351
August 13, 1997	.006445
August 14, 1997	.006406
August 19, 1997	.006427
August 20, 1997	.006380
August 21, 1997	.006425

Switzerland franc:

August 5, 1997	$0.651042

Thailand baht (tical):

August 1, 1997	$0.031056
August 2, 1997	.031056
August 3, 1997	.031056
August 4, 1997	.031546
August 5, 1997	.031847
August 6, 1997	.032206

FOREIGN CURRENCIES—Variances from quarterly rates for August 1997 (continued):

Thailand baht (tical) (continued):

August 7, 1997	$0.032258
August 8, 1997	.032206
August 9, 1997	.032206
August 10, 1997	.032206
August 11, 1997	.032000
August 12, 1997	.031797
August 13, 1997	.031898
August 14, 1997	.031646
August 15, 1997	.031279
August 16, 1997	.031279
August 17, 1997	.031279
August 18, 1997	.030675
August 19, 1997	.030628
August 20, 1997	.030864
August 21, 1997	.030395
August 22, 1997	.029718
August 23, 1997	.029718
August 24, 1997	.029718
August 25, 1997	.029674
August 26, 1997	.029718
August 27, 1997	.029499
August 28, 1997	.029070
August 29, 1997	.028986
August 30, 1997	.028986
August 31, 1997	.028986

Dated: September 2, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

RENEWAL OF THE GENERALIZED SYSTEM OF PREFERENCES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: The Generalized System of Preferences (GSP) is a renewable preferential trade program that allows the eligible products of designated developing countries to directly enter the United States free of duty. The GSP program expired on May 31, 1997, but has been renewed, effective August 5, 1997, with retroactive effect to June 1, 1997, by a provision in the Budget Reconciliation Tax Act of 1997. This document provides notice to importers that Customs will begin processing refunds on all duties paid, with interest from the date the duties were deposited, on GSP-eligible merchandise that was entered on June 1, 1997, through August 4, 1997, and that Customs will accept claims for GSP duty-free treatment for merchandise entered, or withdrawn from a warehouse, for consumption on or after August 5, 1997, through June 30, 1998, the provisions current legislative sunset date.

DATES: Customs will begin the processing of refunds on duties paid—with interest as set forth in this document—August 29, 1997.

FOR FURTHER INFORMATION CONTACT: For general operational questions:

Formal entries	John Pierce, 202–927–1249
Informal entries	Thomas Wygant, 202–927–1167
Mail entries	Dan Norman, 202–927–0542
Passenger claims	Robert Jacksta, 202–927–1311

For specific questions relating to the Automated Commercial System: Eric Blank, Office of Information and Technology, 202–927–0441.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 501 of the Trade Act of 1974 (the 1974 Act), as amended (19 U.S.C. 2461), authorizes the President to establish a Generalized System of Preferences (GSP) to provide duty-free treatment for eligible ar-

ticles imported directly from designated beneficiary countries for specific time periods. Pursuant to 19 U.S.C. 2465(a), as amended by the GSP Renewal Act of 1996 (Pub.L. 104–188, 110 Stat. 1775, at Stat. 1917), duty-free treatment under the GSP program expired on May 31, 1997.

On August 5, 1997, the President signed the Budget Reconciliation Tax Bill of 1997 (the 1997 Act, tentatively scheduled to be published as Pub.L. 105–34, 111 Stat. 788); section 981 pertains to the extension of duty-free treatment and the retroactive application for certain liquidations and reliquidations under the GSP (the 1997 Act, *op. cit.*). Section 981 makes provision to apply GSP duty-free treatment to eligible articles from designated beneficiary countries that are entered, or withdrawn from warehouse, for consumption on or after August 5, 1997, through June 30, 1998, and, for those entries made after May 31, 1997 through August 4, 1997, to which duty-free treatment would have applied, to refund any duty paid with respect to such entry, provided that a request for liquidation or reliquidation is filed with Customs by February 4, 1998, *i.e.*, within 180 days after the date of the 1997 Act's enactment, that contains sufficient information to enable Customs to locate the entry or to reconstruct the entry if it cannot be located.

Recognizing the impact that retroactive renewal and consequent numerous reliquidations will have on both importers and Customs, Customs developed a mechanism to facilitate refunds *(see*, Federal Register Notice of June 4, 1997, 62 FR 30672) that will begin processing refunds August 29, 1997. Customs expects the processing of refunds to take from four to eight weeks for certain, formal Automated Broker Interface (ABI) entries.

DUTY-FREE ENTRY SUMMARIES

Effective August 5, 1997, filers again will be entitled to file GSP eligible entry summaries without the payment of estimated duties.

REFUNDS WITH INTEREST

A. *Formal Entries:*

Customs will liquidate or reliquidate all affected entry summaries and refund any duties deposited for items denominated on the GSP line. Field locations shall not issue GSP refunds except as instructed to do so by Customs Headquarters.

If an ABI entry summary was or will be filed with payment of estimated duties using the Special Program Indicator (SPI) for the GSP (the letter "A") as a prefix to the tariff number, no further action by the filer is required; filings with the SPI "A" will be treated as conforming requests for refunds.

Non-ABI filers who either did or did not request a refund by using the SPI "A" must request a refund in writing from the Port Director at the port of entry by February 4, 1998. The letter may cover either single entry summaries or all entry summaries filed by an individual filer at a

single port. To expedite refunds, Customs recommends the following information be included in each letter:

1. A statement requesting a refund, as provided by section 981 of the Budget Reconciliation Tax Act 1997;
2. An enumeration of the entry numbers and line items for which refunds are requested; and
3. The amount requested to be refunded for each line item and the total amount owed for all entry summaries.

Interest on duties deposited will be paid, pursuant to section 505 of the Tariff Act of 1930, as amended (19 U.S.C. 1505), based on the quarterly Internal Revenue Service interest rates used to calculate interest on refunds of Customs duties as follows:

June 1, 1997	— June 30, 1997	8%
July 1, 1997	— July 31, 1997	8%
August 1, 1997	— August 4, 1997	8%

B. *Informal Entries:*

Refunds with interest on informal entries filed via ABI on a Customs Form 7501 with the SPI "A" will be processed in accordance with the procedures discussed above.

C. *Mail Entries:*

The addressees must request a refund of GSP duties and return it, along with a copy of the CF 3419A, to the appropriate International Mail Branch (address listed on bottom right hand corner of CF 3419A). It is essential that a copy of the CF 3419A be included, as this will be the only means of identifying whether GSP products have been entered and estimated duties and fees have been paid.

D. *Baggage Declarations and Non-ABI Informals:*

If travelers/importers wrote a statement directly on their Customs declarations (CF 6059B) or informal entries (CF 363 or CF 7501) requesting a refund, no further action by the traveler/importer will be required; the statement will be treated as a conforming request for refunds. Failure to request a refund in this manner does not preclude a traveler/importer from otherwise making a timely request in writing, as described above for non-ABI filers.

Dated: August 27, 1997.

ROBERT TROTTER,
Assistant Commissioner,
Field Operations.

[Published in the Federal Register, September 3, 1997 (62 FR 46549)]

ANNOUNCEMENT OF PROGRAM TEST: SIMPLIFICATION OF IN-TRANSIT TRUCK SHIPMENTS BETWEEN CANADA AND THE U.S.

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice announces a joint U.S. Customs and Revenue Canada Customs plan to conduct a pilot test of simplified procedures regulating the in-transit movement of truck shipments transiting Canada and the United States. The simplified procedures reduce the number of processing steps or stops required of a carrier transiting either Canada or the United States from four to two. This notice also invites public comments concerning any aspect of the planned pilot test program.

EFFECTIVE DATES: The test of this pilot program will commence no earlier than October 8, 1997, and will run for approximately six months, with evaluations of the program occurring periodically. Comments must be received on or before October 2, 1997.

ADDRESSES: Written comments regarding this notice should be addressed to Walter Lechowski, East Great Lakes Customs Management Center, Floor 3, Building 10, 4455 Genesee Street, Buffalo, New York 14225–1928.

FOR FURTHER INFORMATION CONTACT:

For U.S. Customs issues: Walter Lechowski, (716) 626–0400, ext. 203;
For Revenue Canada Customs issues: Bryan Daly, (613) 954–7081.

SUPPLEMENTARY INFORMATION:

BACKGROUND

With a long history of working together, Canada and the United States have much in common. The Customs Services in each country operate more and more in a similar fashion because they are faced with many of the same problems and challenges associated with the rapidly changing business and economic environment. Trade between Canada and the United States is a billion dollar a day proposition. Tourism provides millions of jobs for Canadians and Americans. More than 100 million travellers cross our common border each year. This environment brings with it the threat of guns, smuggling, drugs, and crime. Conversely, our citizens and customers are therefore demanding better service and protection at less cost.

In response to these demands, on February 24, 1995, at a Summit in Ottawa, Canada, President Clinton and Canadian Prime Minister Chretien announced agreement on a Canada/United States Accord on our Shared Border for enhancing the management of the U.S.-Canada border. See, 31 Weekly Comp.Pres.Doc. 305. The Shared Border Accord sets out common objectives and specific initiatives to promote trade, tourism, and travel between the two countries by reducing barriers for legitimate importers, exporters, and travelers, while strengthening en-

forcement capabilities to stop the flow of illegal movement of goods and reducing costs for both governments and users. One of the common objectives of the Shared Border Accord is to promote international trade by adopting the best practices of each country to permit commercial goods and legitimate travellers to flow easily between both countries.

To aid in the development of this objective, Revenue Canada Customs and U.S. Customs jointly propose a change to the current procedures concerning the reporting and control of truck shipments transiting Canada between ports in the U.S. and truck shipments transiting the U.S. between ports in Canada. The present United States regulations applicable to in-transit truck traffic between our two countries are set forth as subpart E of Part 123 of the Customs Regulations (19 CFR Part 123, subpart E) and require such traffic to report to a Customs facility a minimum of four times: once in crossing the border bound for the other country; twice while in the other country, *i.e.*, once when arriving and once when departing; and once again when reentering the country of destination. The procedural change proposed in this document for this type of international traffic will eliminate the first and third check stops. Accordingly, the reporting requirements contained at §§ 123.41(b) and (c)(2) of the Customs Regulations, concerning truck shipments transiting Canada, and 123.42(b) and (d) of the Customs Regulations, concerning truck shipments transiting the U.S., will be suspended during this pilot test procedure. This test procedure will apply along the entire border area between Canada and the U.S. and will not otherwise affect the procedures relating to other forms of shipments, such as those relating to transportation and exportation shipments. Significant financial and safety related benefits for commercial highway carriers and bridge operators are anticipated; carriers should enjoy a reduction in travel time; and bridge operators should enjoy less truck congestion at outbound lanes, and greater driver safety since truck drivers will no longer need to cross active traffic lanes to reach Customs offices from outbound lanes. Compliance examinations conducted by both Customs Services will enhance enforcement, and provide a basis for formulating threat assessments.

The implementation date for a test of these new procedures is October 8, 1997. Upon implementation, both Customs Services will begin an evaluation period of at least six months to ensure the effectiveness of the program and to identify any short falls. If the program is successful, both Customs Services will begin the process to change current regulations to make the new procedure permanent.

For programs designed to evaluate the effectiveness of new technology or operations procedures regarding the processing of passengers, vessels, or merchandise, § 101.9(a) of the Customs Regulations (19 CFR 101.9(a)), implements the general testing procedures. This test is established pursuant to that regulation.

THE PRESENT IN-TRANSIT PROCEDURE

Stop # 1 (exiting the first country)—A commercial carrier transiting either Canada or the U.S. is required to stop at the domestic

port of departure to have its movement authorized by having the in-transit manifest stamped.

Stop # 2 (arriving in the other country)—Upon arriving in the other country, the commercial carrier is required to stop so that foreign Customs can further process the movement; the manifest is stamped again and the top copy is retained by foreign Customs; an inventory is created to control the merchandise while in the country.

Stop # 3 (exiting the country transited)—Upon exiting the country transited, the commercial carrier is required to stop again so that foreign Customs can cancel the manifest; foreign Customs retains the second (blue) copy of the manifest.

Stop # 4 (re-entering the first country)—Upon re-entry into the first country, the commercial carrier is required to stop again so that domestic Customs can further process the manifest to facilitate entry of the merchandise; domestic Customs retains the third (green) copy of the manifest; the driver is given the fourth (pink) copy of the manifest.

For example, in a trip from Michigan to New York that transits Canada, the driver for a commercial carrier must stop at U.S. Customs in Port Huron, Michigan, to have the manifest stamped to authorize this movement. Then, upon arrival in Sarnia, Ontario, Canada, the driver must stop again so that Canadian Customs can process the manifest by stamping and removing the top (white) copy. The driver then proceeds through Ontario to the port of exit at Queenston, Ontario. At Queenston, the driver must stop again so that Canadian Customs can further process the manifest by retaining the second (blue) copy. The driver then proceeds to Lewiston, New York, and stops again so that U.S. Customs can finalize the process by retaining the third (green) copy. The fourth (pink) copy of the manifest is returned to the driver. This process works the same way when commercial carriers in Canada transit the U.S. for return to Canada.

THE PROPOSED IN-TRANSIT PROCEDURE

Old stop # 1 no longer required—Commercial carriers transiting either Canada or the U.S. will no longer be required to stop at the domestic port of departure to initiate the in-transit movement. Drivers will proceed directly to the other country.

New stop # 1 (arriving in the other country)—Arriving in the other country, the driver stops so that foreign Customs will review the manifest for accuracy and verify that the merchandise does qualify for this movement. The foreign Customs will confirm the residency of the driver and, if all is in order, stamp the manifest, noting seal numbers where applicable.

Old stop # 3 no longer required—Drivers will now proceed to the port of entry for the first country for re-entry.

New stop # 2 (re-entering the first country)—Upon re-entry into the first country, the driver will stop so that domestic Customs can complete the processing of the manifest; the second (blue) copy of the manifest will be returned to the other country's Customs. The Customs Service of the first country retains the third (green) copy

of the manifest, and the driver is given the fourth (pink) copy of the manifest.

Thus, in the example above, the driver departs the U.S. at Port Huron, Michigan. Arriving at Sarnia, Ontario, Canada, the driver stops and Canadian Customs initiates the process, noting seal numbers where applicable, stamping and retaining the top (white) copy of the manifest. The driver then proceeds through Ontario to the U.S. port at Lewiston, New York. There, the driver stops and U.S. Customs finalizes the process, stamps the manifest and retains the second (blue) and third (green) copies; the fourth (pink) copy of the manifest is returned to the driver. U.S. Customs will return the second (blue) copy of the manifest to Customs in Canada, following local agreement on transmittal procedures. This process will work the same way when commercial carriers in Canada transit the U.S. for return to Canada. During the test, U.S. Customs may continue to use the Customs Form 7512(C)(CF 7512(C)–Destination) as a source for the "Transit Manifest No." for carriers transitting the United States.

Regulatory Provisions Affected

During the In-Transit truck shipment test, the normal departure reporting requirements of subpart E of Part 123 of the Customs Regulations (19 CFR Part 123, subpart E) will be suspended. These reporting requirements are contained at § 123.41(b) and (c)(2) of the Customs Regulations, which concerns truck shipments transiting Canada, and § 123.42(b) and (d) of the Customs Regulations, which concerns truck shipments transiting the U.S.

Enforcement Provisions

The transportation of restricted or prohibited merchandise is not permitted during the pilot test, and participants will be subject to civil and criminal penalties and sanctions for any violations of U.S. Customs laws.

Both Customs agencies will be conducting statistically valid compliance examinations on in-transit carriers, and both Customs agencies will be formulating risk assessments using the Compliance Measurement results.

Comments and evaluation of Test

Customs will review all public comments received concerning any aspect of the test program or procedures, and finalize procedures in light of those comments. Approximately 120 days after conclusion of the test, evaluations of the test will be conducted and final results will be made available to the public upon request.

Dated: August 22, 1997.

Robert S. Trotter,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, September 3, 1997 (62 FR 46551)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 27, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF AUTOMOTIVE WHEEL HUB UNIT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling relating to the tariff classification of automotive wheel hub units. These articles, also referred to as the Wheel Hub 2, are double row, angular contact ball bearings designed for use on either a front or rear non-driven wheel. Notice of the proposed revocation was published on July 23, 1997, in the CUSTOMS BULLETIN.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 23, 1997, Customs published a notice in the CUSTOMS BULLETIN, Volume 31, Number 30, proposing to revoke NY 853708, dated July 6, 1990, which classified an automotive wheel hub unit, or Wheel Hub 2, in subheading 8708.60.50, Harmonized Tariff Schedule of the United States (HTSUS), as other parts and accessories of motor vehicles. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested par-

ties that Customs is revoking *NY* 853708 to reflect the proper classification of the Wheel Hub 2 in subheading 8482.10.50, HTSUS, a provision for other ball bearings. *HQ* 960049, revoking *NY* 853708 is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 26, 1997.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 26, 1997.

CLA–2 RR:TC:MM 960049 JAS
Category: Classification
Tariff No. 8482.10.50

MR. JOHN A. SLAGLE
WOLF D. BARTH CO., INC.
7575 Holstein Ave.
Philadelphia, PA 19153

Re: *NY* 853708 revoked; automotive wheel hub unit, wheel hub 2, double row, angular contact ball bearing with flanged outer ring and spigot for mounting on front or rear non-driven wheel; *HQ* 950771.

DEAR MR. SLAGLE:

In *NY* 853708, dated July 6, 1990, issued to you by the Area Director of Customs, New York Seaport, on behalf of SKF U.S.A., Inc., the SFK Wheel Hub 2 (Series BAFB), was held to be classifiable in subheading 8708.60.50, Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *NY* 853708 was published on July 23, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 30.

Facts:

As described in *NY* 853708, the automotive wheel hub assembly designated the SKF Wheel Hub 2 (Series BAFB), is a double row, angular contact ball bearing. Although designed for use either on a front or rear non-driven wheel, this wheel hub unit is designed specifically for incorporation as the front wheel hub on the Lincoln Town Car. Submitted literature describes the flanged outer ring of Wheel Hub 2 as a lightweight structural component with threaded holes or studs and a spigot to center and mount the brake and wheel.

Issue:

Whether the flanged outer ring and spigot design configuration of Wheel Hub 2 removes it from heading 8482, HTSUS, as ball or roller bearings, and parts thereof.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description and Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Relevant **ENs** at p. 1433 state in part that heading 84.82 covers all ball, roller or needle roller type bearings. They are used in place of smooth metal bearings and enable friction to be considerably reduced. Normally, bearings consist of two concentric rings (races) enclosing the balls or rollers, and a cage which keeps them in place and ensures that their spacing remains constant. The heading includes ball bearings with single or double rows of balls.

NY 853708 states, in part, that Wheel Hub 2 demonstrates functions which are in excess of those normally associated with ball or roller bearings. However, it is apparent that for ball or roller bearings to function as friction-reducing elements they must necessarily have design features which permit them to attach to a shaft or machinery part with which they will be used. It is our opinion that only a design feature or features which imparts a significant additional non-friction reducing capability to a ball or roller bearing will remove that bearing from the scope of heading 8482. In this case, the available information indicates the flanged outer ring and spigot on Wheel Hub 2, described as a lightweight structural component, facilitate centering and mounting of the brake and wheel. We are now of the opinion that this is a design feature common to ball or roller bearings of this type that does not impart a significant nonfriction-reducing capability. As such, Wheel Hub 2 remains within the scope of heading 8482. The fact that Wheel Hub 2 may be designed specifically for incorporation as the front wheel hub on the Lincoln Town Car is not legally relevant because many ball or roller bearing types are manufactured to specific engineering and design criteria and are purchased with a particular application in mind. *See HQ* 950771, *dated March 23, 1992, and related rulings. Heading 8482 describes a commodity* eo nomine, by name. In the absence of a contrary legislative intent, judicial decision, or administrative practice, and without proof of commercial designation, an unlimited *eo nomine* designation will include all forms of the named article.

Holding:

Under the authority of GRI 1, the automotive wheel hub unit designated Wheel Hub 2 (Series BAFB) is provided for in heading 8482. It is classifiable in subheading 8482.10.50, HTSUS.

NY 853708, dated July 6, 1990, is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF AZINPHOS-METHYL (CAS 86–50–0)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of Azinphos-methyl (CAS 86–50–0). Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before October 17, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington D.C.

FOR FURTHER INFORMATION CONTACT: Robert Cascardo, Food and Chemicals Classification Branch (202) 482–7061.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of Azinphos-methyl (CAS 86–50–0). Comments are invited on the correctness of the proposed ruling.

In New York Ruling Letter (NYRL) A87042, dated August 27, 1996, Customs held that Azinphos-methyl (CAS 86–50–0) is classifiable in subheading 2933.90.1700, HTSUS. NYRL A87042 is set forth as "Attachment A" to this document.

Azinphos-methyl, which has the chemical name "0, 0-Dimethyl S-[4oxo-1,2,3,-benzotriazin-3(4H)-yl)menthyl]-phosphorodithioate," is provided for, by name, within subheading 2933.90.0200, HTSUS. Therefore, we believe that the subject Azinphos-methyl (CAS 86–50–0) is properly classifiable under subheading 2933.90.0200, HTSUS.

Customs intends to modify NYRL A87042 to reflect the proper classification of Azinphos-methyl (CAS 86–50–0) under subheading

2933.90.0200, HTSUS. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HRL) 960172 modifying NYRL A87042 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: August 22, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, August 27, 1996.

CLA–2–29:RR:NC:FC:238 A87042
Category: Classification
Tariff No. 2933.90.1700 and 3808.10.2500

MS. B.C. JARDAK
BAYER CORPORATION
8400 Hawthorn Road
P.O. Box 4913
Kansas City, MO 64120–0013

Re: The tariff classification of Azinphos-methyl *(CAS–86–50–0)*, imported in bulk form, and: Guthion® 2L, Guthion® 2S, Guthion® 3F, Guthion® 50% Solupak, and Guthion® 50% Wettable Powder, from Germany

DEAR MS. JARDAK:

In your letter dated August 13, 1996, you requested a tariff classification ruling.

You indicate in your letter that you intend to import Azinphos-methyl insecticide (technical grade) into a foreign trade zone, where you will utilize it, as the active ingredient, in the production of the following formulated insecticides (preparations): Guthion® 2L, Guthion® 2S, Guthion® 3F, Guthion® 50% Solupak, and Guthion® 50% Wettable Powder.

The applicable subheading for Azinphos-methyl, imported in bulk form, will be 2933.90.1700, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Heterocyclic compounds with nitrogen hetero-atom(s) only: Other: Aromatic or modified aromatic: Other: Pesticides: Other: Insecticides." The rate of duty will be 11.3 percent *ad valorem*. The applicable subheading for Guthion® 2L, Guthion® 2S, Guthion® 3F, Guthion® 50% Solupak, and Guthion® 50% Wettable Powder will be 3808.10.2500, HTS, which provides for: "Insecticides, * * *, put up in forms or packings for retail sale or as preparations or articles * * *: Insecticides: Containing any aromatic or modified aromatic insecticide: Other." The rate of duty will be 1.1 cents per kilogram plus 8.4 percent *ad valorem*.

This merchandise may be subject to the regulations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which is administered by the Environmental Protection Agency, Office of Pesticide Programs. You may contact them at 401 M Street, S.W., Washington, DC 20460, telephone number (703) 305–7092.

This merchandise may be subject to the regulations of the environmental Protection Agency, Office of Pesticides and Toxic Substances. You may contact them at 402 M Street,

S.W., Washington, D.C. 20460, telephone number (202) 554–1404, or EPA Region II at (908) 321–6669.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Cornelius Reilly at 212–466–5770.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:FC 960172 RC
Category: Classification
Tariff No. 2933.90.0200

MS. B.C. JARDAK
BAYER CORPORATION
8400 Hawthorn Road
P.O. Box 4913
Kansas City, MO 64120–0013

Re: Modification of NYRL A87042; Azinphos-methyl (CAS 86–50–0).

DEAR MS. JARDAK:

This letter modifies New York Ruling Letter (NYRL) A87042, dated August 27, 1996, wherein Customs Ruled, in part, on the tariff classification of Azinphos-methyl (CAS–86–50–0) imported in bulk form from Germany.

Facts:

This ruling is intended to modify NYRL A87042, and only pertains to the product identified as Azinphos-methyl (CAS 86–50–0), which was classified within subheading 2933.90.1700, Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Issue:

What is the correct tariff classification for Azinphos-methyl (CAS 86–50–0)?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

It has come to our attention that the product identified as Azinphos-methyl, was incorrectly classified in NYRL A87042. In fact, Azinphos-methyl, which has the chemical name of 0,0-Dimethyl S-[4-oxo-1,2,3-benzotriazin-3(4H)-yl)methyl]-phosphorodithioate, is provided for, by name, within subheading 2933.90.0200, HTSUSA.

Holding:

The product identified as, Azinphos-methyl, is properly classifiable within subheading 2933.90.0200, HTSUSA, which provides for "Heterocyclic compounds with nitrogen het-

ero-atom(s) only: Other: Aromatic or modified aromatic: 0,0-Dimethyl S-[4-oxo-1,2,3-benzotriazin-3(4H)-yl)methyl]-phosphorodithioate." This provision is duty free under the general column one rate.

NYRL A87042 is hereby modified.

This merchandise may be subject to the regulations of the Environmental Protection Agency, Office of Pesticides and Toxic Substances. You may contact them at 402 M Street, S.W., Washington, D.C., 20460, (202) 554–1404, or EPA Region II at (908) 321–6669.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO OPERATIONS INCIDENTAL TO THE ASSEMBLY PROCESS AND TO CUSTOMS RULING LETTERS RELATING TO THE DEFINITION OF "TEXTILE OR APPAREL GOODS" FOR DETERMINING ELIGIBILITY FOR DUTY-FREE ENTRY PURSUANT TO SUBHEADING 9802.00.90, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement (NAFTA) Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to whether certain operations are considered incidental to the assembly process for purposes of subheadings 9802.00.80 and 9802.00.90, Harmonized Tariff Schedule of the United States (HTSUS), and two ruling letters with respect to the applicable definition of a "textile or apparel good" to determine eligibility for duty-free entry pursuant to subheading 9802.00.90, HTSUS. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before October 17, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., Franklin Court, Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: David Cohen, Special Classification and Marking Branch, (202) 482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to partially modify a ruling pertaining to whether certain operations are considered incidental to the assembly process for purposes of subheadings 9802.00.80 and 9802.00.90, HTSUS. In addition, Customs intends to partially modify two ruling letters that apply the incorrect definition of a "textile or apparel good" for purposes of determining eligibility pursuant to subheading 9802.00.90, HTSUS.

In Headquarters Ruling Letter (HRL) 732257, dated May 16, 1990 (Attachment A), Customs ruled on whether U.S.-Knit nylon and/or lycra tubes sent to Mexico where the tubes where cut from the top opening to the crotch area, the separate pieces were sewn together, and the assembled pantyhose were dyed, packaged, and shipped to the U.S. were eligible for a partial duty exemption pursuant to 9802.00.80, HTSUS, Customs held that the components failed to meet the requirements of the tariff provision because they were not exported in a condition ready for assembly without further fabrication. However, in *L'Eggs Products, Inc. v. United States*, 13 CIT 40, 704 F. Supp. 1127 (Ct. Int'l Trade 1989), the court concluded that, under a nearly identical fact situation (except for the dyeing operation), the nylon pantyhose tubes were fully fabricated components exported in a condition ready for assembly, and the slitting and sewing operation was not a further fabrication operation which would render the tubes ineligible for partial duty relief. Since subheading 9802.00.90, HTSUS, is a successor provision to subheading 9802.00.80, HTSUS, it is Custom's position that rulings with respect to 8802.00.80, HTSUS, are instructive with regard to the types of operations that Customs will find to be incidental to the assembly.

Since the Court of International Trade has concluded that the slitting and sewing operations of pantyhose nylon tubes do not constitute a further fabrication of the nylon tubes, Customs proposes to modify HRL 732251 to reflect this position.

In addition, Customs proposes to modify two ruling letters with respect to what articles will be considered "textile or apparel goods" for purposes of subheading 9802.00.90, HTSUS, eligibility. Customs proposes to modify HRL 559961, dated March 3, 1997 (Attachment B) and HRL 559363, dated February 13, 1997 (Attachment C) which cite section 102.21(b)(5), Customs Regulations (19 CFR 102.21 (b)(5)) as the applicable definition of a "textile or apparel good." These two ruling letters apply the incorrect definition of a "textile or apparel good" for purposes of determining eligibility pursuant to subheading 9802.00.90, HTSUS. The applicable definition of a "textile or apparel good" to sub-

heading 9802.00.90, HTSUS, eligibility issues is found in Appendix 1.1 of Annex 300–B of the NAFTA.

Before taking these actions, consideration will be given to any written comments timely received. The proposed ruling modifying HRL 732257, HRL 559961, and HRL 559363 is set forth in Attachment D to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: August, 22, 1997.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 16, 1990.
MAR 2–05 CO:R:C:V 732257 pmb
Category: Marking

MR. JAY K. GRONLUND
THE PATHFINDER GROUP, INC.
50 East 42nd Street
New York, NY 10017

Re: Country of origin marking of imported women's pantyhose.

DEAR MR. GRONLUND:

This is in response to your February 14, 1989, letter to our New York office, on behalf of your client, Hampshire Hosiery, Inc. (the importer). Your letter has been forwarded to us for response. We regret the delay.

Facts:

According to your letter, the importer manufactures certain women's pantyhose. The manufacturing process consists of knitting "tubes" of lycra and/or nylon in the U.S. and a separate patch for the crotch area. These separate pieces are then shipped to Mexico where the tubes are cut from the top opening to the crotch area, the separate pieces are sewn together and, in most cases, the assembled pantyhose are dyed. Thereafter, the assembled pantyhose are folded around a piece of cardboard, placed in a cellophane bag and shipped back to the U.S. Once in the U.S. the pantyhose, in the cellophane bag, are inserted in a retail "envelope type" package. The retail package will be marked with the words "Knit in the U.S.A., Assembled in Mexico," which will appear on the back panel of the retail package and in close proximity to the name and domestic address of the U.S. distributor.

Issues:

Whether the pantyhose will qualify for the duty exemption available under HTSUS subheading 9802.00.80 when returned to the U.S.

Whether the proposed country of origin marking satisfies the country of origin marking requirements.

Law and Analysis:

With regard to the first issue, HTSUS subheading 9802.00.80 provides a partial duty exemption for:

> [a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without

> further fabrication, (b) have not lost their physical identity in such articles by change in form, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process, such as cleaning, lubrication, and painting.

All requirements of HTSUS subheading 9802.00.80 must be satisfied before a component may receive a duty allowance. An article entered under this tariff provision is subject to duty upon the full cost or value of the imported assembled article less the cost or value of the U.S. components assembled therein, upon compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.14 (D), Customs Regulations (19 CFR 10.14(a)), states in part that:

> [t]he components must be in condition ready for assembly without further fabrication at the time of their exportation from the United States to quality for the exemption. Components will not lose their entitlement to the exemption by being subjected to operations incidental to the assembly either before, during, or after their assembly with other components.

Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations. However, any significant process, operation or treatment whose primary purpose is the fabrication, completion, physical or chemical improvement of a component procludes the application of the exemption under HTSUS subheading 9802.00.80 to that component. *See,* section 10.16(c), Customs Regulations (19 CFR 10.16(c)).

In the instant case, the samples and description of the foreign operations show that the pantyhose will not qualify for the duty exemption available under subheading 9802.00.80, HTSUS because the components fail to meet the requirements of clause (a) of the tariff provision, as they are not exported in a condition ready for assembly without further fabrication. Cutting the pantyhose tube is not an acceptable assembly operation or operation incidental to assembly, but is further fabrication of the pantyhose. The cutting operation is not simply cutting a component to length, but is similar to cutting fabric for a specific pattern in order to sew the newly cut components together. See, 19 CFR 10.16(c)(2). Furthermore, the dyeing operation will disqualify the pantyhose from HTSUS subheading 9802.00.80 treatment pursuant to 19 CFR 10.16(c)(4), which states that chemical treatment of components or assembled articles, such as dyeing, to impart new characteristics is not a proper operation incidental to the assembly process. Therefore, the pantyhose will not qualify for the duty exemption available under HTSUS subheading 9802.00.80.

With regard to the second issue, section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.41(b), Customs Regulations (19 CFR 134.41(b)), provides that the marking of an imported product must be conspicuous enough so that the ultimate purchaser will be able to find the marking easily and read it without strain.

Because the articles in question are textile products subject to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), section 12.130, Customs Regulations (19 CFR 12.130), is applicable. Section 12.130 provides that generally the country of origin of a textile product is that foreign territory, country or insular possession where the article last underwent a substantial transformation. However, there is an exception to the general rule set forth in section 12.130(c), Customs Regulations (19 CFR 12.130(c)). Section 12.130(c) provides that U.S. textile articles that are advanced in value or improved in condition, or assembled in a foreign country are considered to be products of that foreign country, for marking purposes.

In this case, the pantyhose are shipped to Mexico in pieces. They are not ready for retail sale until after the processing they undergo in Mexico, in which they are cut and sewn together to form the finished pantyhose. We find, therefore, that the pantyhose are clearly advanced in value and improved in condition by such processing. Accordingly, under 19 CFR 12.130(c) the finished pantyhose are products of Mexico for country of origin marking purposes.

You have indicated that the pantyhose will be imported without individual marking and will be repackaged in individual retail cartons in the U.S. Marking these cartons in lieu of

marking the individual products is acceptable. Pursuant to 19 U.S.C. 1304(a)(3)(D) and section 134.32(d), Customs Regulations (19 CFR 134.32(d)), an exception from individual marking is applicable where the marking of a container of an article will reasonably indicate the origin of such article. This exception is normally applied in cases where the imported article is imported in a properly marked container and Customs officials at the port of entry are satisfied that the ultimate purchaser will receive the article in the original unopened marked container. However, for articles that are to be repacked after release from Customs custody, section 134.34, Customs Regulations (19 CFR 134.34), requires that an exception under 19 CFR 134.32(d), may be authorized in the discretion of the district director at the port of entry, under certain specified conditions. One of these is that the district director must be satisfied that, if unmarked articles will be repacked in the U.S., the new containers will properly indicate the country of origin of the articles to an ultimate purchaser in the U.S.

With regard to the country of origin marking, itself, we note Customs has previously determined that the words "Assembled in Mexico" constitute sufficient country of origin marking for articles that are assembled in Mexico and eligible for duty exemption under subheading 9802.00.80, HTSUS. (*See* HQ 731507, issued October 17, 1989.) Since the subject pantyhose are not eligible for duty exemption under subheading 9802.00.80, HTSUS, the words "Assembled in," are not acceptable. Therefore, you must use words such as "Product of," "Made in," or other words of similar meaning to indicate the country of origin in this case.

In addition, Customs has determined that in certain circumstances the words "Knit in" are words similar in meaning to the words "Made in," and "Product of," for country of origin marking purposes. (See Ruling 733323, dated May 2, 1990.) In this case, since Mexico is the country of origin of the pantyhose, the U.S. reference should indicate that the *fabric* is knit in the U.S. (e.g., "Product of Mexico, Fabric Knit in the U.S.A.").

Lastly, we note that section 134.46, Customs Regulations (19 CFR 134.46), requires that when the name of any city or locality in the U.S., or the name of any foreign country or locality other than the country in which the article was manufactured or produced, appear on an imported article or its container, there shall appear legibly and permanently, in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning. Assuming the language is changed, we find that the country of origin marking in this case, which is sufficiently conspicuous and appears directly next to the name and domestic address of the U.S. distributor, satisfies the requirements of 19 CFR 134.46.

Based on our examination of the retail carton in this case, we are of the opinion that the country of origin marking (as we suggested above) satisfies the requirements of 19 U.S.C. 1304 and 19 CFR 134.46. Consequently, we suggest you contact the local Customs office to request an exception from marking for repacked articles under 19 CFR 134.34 and submit a sample retail carton for their examination and approval.

Holding:

Pantyhose tubes that are cut in Mexico and sewn to a cotton panel to form completed pantyhose, are not eligible for duty exemption under subheading 9802.00.80, HTSUS, because cutting the pantyhose tube is not an acceptable assembly operation or operation incidental to assembly.

For country of origin marking purposes, the pantyhose are considered to be products of Mexico and must be marked accordingly. The words "Assembled in Mexico" are not acceptable because the pantyhose are not eligible for duty exemption under subheading 9802.00.80, HTSUS. The pantyhose may be excepted from individual marking if the individual retail containers in which they are sold to the ultimate purchaser are marked in the manner described above. However, since the pantyhose are repacked in such cartons after importation, appropriate arrangements must be made with the local district director of Customs, pursuant to 19 CFR 134.34, for an exception from individual marking of the hosiery.

MARVIN M. AMERNICK,
Chief,
Value, Special Programs and Admissibility Branch.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 3, 1997.

CLA 02 RR:TC:SM 559961 KKV
Category: Classification
Tariff No. 9802.00.90

MR. JACK ALSUP
ALSUP & ALSUP, INC.
P.O. Box 1251
Del Rio, TX 78841

Re: Applicability of subheading 9802.00.90, HTSUS, to motor vehicle safety seat belts; special regime program; findings; sewing; cutting to length; removing excess material; printing perforated labels; Article 509.

DEAR MR. ALSUP:

This is in response to your letter dated June 17, 1996 (and subsequent submissions dated July 12, 1996, July 23, 1996, February 7, 1997 and February 17, 1997) on behalf of Takata Seat Belts, Inc. which requests a ruling concerning the applicability of subheading 9802.00.90, Harmonized Tariff Schedule of the United States (HTSUS), to certain motor vehicle safety seat belts imported from Mexico. Although your letter indicates that two samples (part #10277258 and part #22659015) are enclosed for our examination, no samples were received.

Facts:

We are informed that Takata Seat Belts, Inc. (hereinafter, "Takata") imports motor vehicle safety seat belts, manufactured by their Mexican subsidiary, into the U.S. under subheading 8708.21.0000, HTSUS. Takata uses various components comprised of different materials in assembling the seat belts in Mexico. These components include the following:

1) Fabric components or "webbing" of nylon used for the strap. The webbing, wholly formed (woven) and cut in the U.S. (but not to length), measures 47 millimeters wide and 274 meters in length and is exported to Mexico on rolls or spools. In the assembly process, this material will be unspooled and cut to length.

2) Other fabric and non-fabric components of U.S. origin used in the assembly process, asserted to be "findings and trimmings," such as an identification label, child warning label, thread and a plastic stop button. The identification labels are shipped to Mexico in perforated sheets and printed in Mexico, then separated and sewn to the belt webbing. We are informed that the total cost of these items does not exceed 25% of the total cost of the components and findings.

3) Other non-textile components such as plastic and metal. These non-fabric components include frames, supports, arms, weights, latches, bearings, screws, rings, cams, springs, pin-latches, bearing shafts, ratchets, ratchet guards, cylinders, shafts, web guide covers, escutcheons, tip inserts, tip covers, buttons, anchor plates, layer covers, bases, tie bars, straps, guides, shafts, lock gears, flywheels, pawls, retainers, weights, actuators, sensors, housings, pads, carton bottoms and pallets. These components may be both of U.S. and foreign manufacture.

We are informed that the sequential assembly operation in Mexico for part #10277258 (F-Body Front Seat Retractor) is as follows:

Assemble ring to latch and bearings. Screw cam to latch. Assemble latch and pin to frame and place Julian date label on frame. Assemble support, arm and weight. Spin, stake support and bushing. Assemble ratchet. Press pad to ratchet. Cut webbing to length. Sew triple zig-zag pattern in webbing to form a loop for the shaft. Print I.D. label. Sew I.D. label. Sew warning label to webbing. Check webbing 100%. Ratchet, webbing, shaft and bushing. Press shaft. Grease spring. Wind spring. Screw spring housing. Check air gap. Checker. Assemble webbing guide to cover. Lace and place cover. Press cover, check and mark. 0.6 G-Tester. 45 degree test and assemble upper cover. Assemble free fall tip. Lace escutcheon and free fall tip. Assemble protector to anchor. Lace anchor and sew X box pattern. Place stop button. Pull sleeve and label. Sew bar tack on sleeve. 100% final check. Make box Pack.

We are informed that the sequential assembly operation in Mexico for part #22659015 (J-Body Front Seat Retractor) is as follows:

> Press tie bar to frame. Press metal strap to frame. Check strap. Assemble sensor (weight to case, actuator and cap). Wind spring to frame and sensor. Assemble pawl A/spring, lock gear and pin. Assemble pawl B and screw. Assemble hook spring and flywheel to shaft. Assemble shaft subassembly, guide and cover. Press pins on cover to secure sensor and shaft. Cut webbing to length. Place heat label on webbing. Thread webbing through shaft, place pin and sew pin pattern in webbing. 0.6 G and 45 degree test. Assemble free fall tip. Thread webbing through tip, guide and anchor. Sew X box pattern in webbing. Press stop button in webbing. Pull boot over anchor. Tack stitch boot to webbing. Final inspection. Ink jet identification. Pack.

Issue:

Whether the motor vehicle safety seat belts will be eligible for duty-free treatment under subheading 9802.00.90, HTSUS, upon importation into the U.S.

Law and Analysis:

Annex 300–B of the North American Free Trade Agreement ("NAFTA") is applicable to textile and apparel goods. Appendix 2.4 of Annex 300–B provides that:

> On January 1, 1994, the U.S. shall eliminate customs duties on textiles and apparel goods that are assembled in Mexico from fabrics wholly formed and cut in the United States and exported from and reimported into the United States under:
>
> (a) U.S. tariff item 9802.00.80.10; or
>
> (b) Chapter 61, 62, or 63 if, after such assembly, those goods that would have qualified for treatment under 9802.00.80.10 have been subject to bleaching, garment dyeing, stone-washing, acid-washing or perma-pressing.
>
> Thereafter, the U.S. shall not adopt or maintain any customs duty on textile or apparel goods of Mexico that satisfy the requirements of subparagraph (a) or (b) or the requirements of any successor provision to U.S. tariff item 9802.00.80.10.

Consequently, subheading 9802.00.90, HTSUS, was created to provide for the duty-free entry of:

> Textile and apparel goods, assembled in Mexico in which all fabric components were wholly formed and cut in the United States, provided that such fabric components, in whole or in part, (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process; provided the goods classifiable in chapters 61, 62, or 63 may have been subject to bleaching, garment dyeing, stone-washing acid-washing or perma-pressing after assembly as provided for herein.

The initial question we must address is whether the subject motor vehicle safety seat belt is considered a "textile and apparel good" under subheading 9802.00.90, HTSUS. Your letter indicates that the article at issue is classified under subheading 8708.21.00, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: other parts and accessories of bodies (including cabs): safety seat belts.

Effective July 1, 1996, the country of origin for textile articles is determined according to the origin rules set forth in 19 CFR 102.2. Section 102.21(b)(5) provides that a "textile or apparel product" is any good classified in Chapters 50 through 63, HTSUS, and any good classifiable under certain enumerated HTSUS headings or subheadings, including subheading 8708.21. Thus, under the facts presented, the subject safety belt, which is classifiable under subheading 8708.21.0000 qualifies as a "textile and apparel good" for purposes of subheading 9802.00.90, HTSUS.

The enactment of subheading 9802.00.90, HTSUS, was intended to extend duty-free and quota-free status to all goods assembled in Mexico, which previously were eligible for entry under the Special Regime Program administered under subheading 9802.00.8010, HTSUS. As a result, it is Customs view that all of the policy directives implementing this program should be considered applicable for the administration of subheading 9802.00.90, HTSUS. One such policy under the Special Regime Program included the allowance of "findings, trimmings, and certain elastic strips of foreign origin" to be incorporated into the assembled good "provided they do not exceed 25 percent of the cost of the components of the assembled product." Examples of findings and trimmings are sewing thread, hooks and eyes, snaps, buttons, "bow buds," lace trim, zippers, including zipper tapes, and labels. See 53 Fed. Reg. 15726 (May 3, 1988).

With regard to the subject safety belts, you assert that the identification label, the child warning label, thread and a plastic stop button qualify as "findings" whose cost does not exceed 25% of the cost of the components and findings. However, inasmuch as you indicate that these articles are of U.S. origin, it is unnecessary to determine whether they qualify as findings because the allowance for findings and trimmings relates only to foreign items.

Because subheading 9802.00.90, HTSUS, was intended as a successor provision to subheading 9802.00.80, HTSUS, with respect to certain textile and apparel goods assembled in Mexico, the regulations under subheading 9802.00.80, HTSUS, may be instructive in determining whether an assembly process would render an article eligible for the beneficial duty treatment accorded by subheading 9802.00.90, HTSUS. (In this regard, however, as distinguished from subheading 9802.00.80, HTSUS, it is noted that subheading 9802.00.90 requires only that all *fabric* components be formed and cut in the U.S., and that only such components, in whole or in part, need be exported from the U.S. in condition ready for assembly without further fabrication.)

Section 10.14(a), Customs Regulations (19 CFR 10.14(a)), states in part that: [t]he components must be in condition ready for assembly without further fabrication at the time of their exportation from the United States to qualify for the exemption. Components will not lose their entitlement to the exemption by being subjected to operations incidental to the assembly either before, during, or after their assembly with other components.

Section 10.16(a). Customs Regulations (19 CFR 10.16(a)), provides that the assembly operation performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners.

Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations. However, any significant process, operation or treatment whose primary purpose is the fabrication, completion, physical or chemical improvement of a component precludes the application of the exemption under HTSUS subheading 9802.00.80 to that component. See, 19 CFR 10.16(c). Examples of operations incidental to the assembly process include trimming, filing, or cutting off of small amounts of excess materials, and cutting to length of wire, thread, tape, foil and similar products exported in similar length (19 CFR 10.16(b)(4) and (b)(6).)

In the instant case, the sewing and gluing operations used to join the fabric components, or to join fabric components to other items, are acceptable assembly operations. Cutting various fabric components to length and cutting off excess thread are operations incidental to the assembly process, and therefore will not disqualify the article from eligibility under subheading 9802.00.90, HTSUS. See Headquarters Letter Ruling (HRL) 557875, dated May 4, 1995

Moreover, with regard to the perforated identification labels exported to Mexico, Custom has previously held that the printing and affixing of labels will not disqualify an article for duty-free treatment under subheading 9802.00.80. In C.S.D. 79–314, 13 Cust. Bull. 1468 (1979), Customs determined that printing which serves the purpose of "origin markings, trademark, polarity, color coding, part number identification, or instruction for use," would not preclude tariff treatment under item 807.00, TSUS (the predecessor of subheading 9802.00.80, HTSUS). *See also*, HRL 557685, dated March 28, 1995.

Accordingly, the motor vehicle safety seat belts assembled in Mexico may be entered free of duty, provided all fabric components are woven or milled in the U.S., the fabric is cut in the U.S. (except for cutting to length), and any foreign findings, trimmings, and elastic strips do not exceed 25 percent of the cost of all components.

Holding:

1) Based on the information provided, a motor vehicle safety seat belt classifiable under subheading 8708.21.0000, HTSUS, qualifies as a "textile and apparel good" pursuant to 19 CFR 102.21.(b)(5) for purposes of determining its eligibility under subheading 9802.00.90, HTSUS.

2) Because the operations performed in Mexico in connection with the fabric components are acceptable assembly operations or operations incidental to such assembly, the imported motor vehicle safety belts qualify for duty-free treatment under subheading 9802.00.90, HTSUS, provided all such components are cut and formed in the U.S., and the cost of all foreign findings and trimmings do not exceed 25 percent of the cost of the components of the assembled article.

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 13, 1997.

CLA–2 RR:TC:SM 559363 BLS
Category: Classification
Tariff Nos 4202.92.9015 and 9802.00.90

PORT DIRECTOR
Box 3130
Laredo, TX 78044–3130

Re: Eligibility of jewelry boxes for duty-free treatment under subheading 9802.00.90, HTSUS.

DEAR SIR:

This is in reference to a letter dated June 30, 1995, from Mr. Timothy Casey, of the Chippenhook Corporation, requesting a ruling that certain jewelry boxes imported from Mexico are eligible for duty-free treatment under subheading 9802.00.90, Harmonized Tariff Schedule of the United States (HTSUS). We understand that shipments are currently being made through your port.

Facts:

Based on the information submitted by Chippenhook, all of the components used in the assembly of the jewelry box are of U.S.-origin, and the fabric components are cut and formed (woven) in the U.S. A sample of the completed jewelry box and individual components has been submitted. The assembly process in Mexico, as described in the submissions, is as follows:

> 1) Pads (die-cut foam on a plastic chip) are folded and punched in the pad machine and delivered to the assembly table.
> 2) The steel shells and fabric are turned through a "wrapper", a machine which shapes the fabric to the shell, and heats it to activate the glue.
> 3) A metal hinge and wrapped top and bottom shells are put through a "wringer", which is a machine which bends the prongs on the shells around the hinge, making a complete box.
> 4) A "puff" (chip back with fabric on the front) is placed in the top of the hinged box, and the pad in the bottom of the box. The box is then closed and placed in a container.

Issue:

Whether the returned jewelry boxes are eligible for duty-free treatment under subheading 9802.00.90, HTSUS, upon return from Mexico.

Law and Analysis:

Annex 300–B of the North American Free Trade Agreement ("NAFTA") is applicable to textile and apparel goods. Appendix 2.4 of Annex 300–B provides that:

> [o]n January 1, 1994, the U.S. shall eliminate customs duties on textiles and apparel goods that are assembled in Mexico from fabrics wholly formed and cut in the United States and exported from and reimported into the United States under:
>
> (a) U.S. tariff item 9802.00.80.10; or
>
> (b) Chapter 61, 62, or 63 if, after such assembly, those goods that would have qualified for treatment under 9802.00.80.10 have been subject to bleaching, garment dyeing, stone-washing, acid-washing or perma-pressing.

> Thereafter, the U.S. shall not adopt or maintain any customs duty on textile or apparel goods of Mexico that satisfy the requirements of subparagraph (a) or (b) or the requirements of any successor provision to U.S. tariff item 9802.00.80.10.

Consequently, subheading 9802.00.90, HTSUS, was created to provide for the duty-free entry of:

> Textile and apparel goods, assembled in Mexico in which all fabric components were wholly formed and cut in the United States, provided that such fabric components, in whole or in part, (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process; provided that goods classifiable in chapters 61, 62 or 63 may have been subject to bleaching, garment dyeing, stone-washing, acid-washing or perma-pressing after assembly as provided for herein.

The initial question we must address is whether the subject jewelry box is considered a "textile and apparel good" under subheading 9802.00.90, HTSUS. In this regard, we find that the article is classified under subheading 4202.92.9015, HTSUS, which provides for trunks, suitcases, jewelry boxes and similar containers, with outer surface of textile materials, other, jewelry boxes of a kind normally sold at retail with their containers.

Section 102.21, Customs Regulations (19 CFR 102.21), controls (with certain exceptions not here pertinent) the determination of country of origin of imported textile and apparel products for Customs laws and the administration of quantitative restrictions. This regulations. This regulation became effective July 1, 1996. Section 102.21(b)(5) (19 CFR 102.21(b)(5)) provides that a *textile or apparel product* is any good classified in Chapters 50 through 63, HTSUS, and any good classifiable under certain enumerated HTSUS headings or subheadings, including subheading 4202.92.90. Accordingly, the jewelry box is considered a "textile and apparel good" for purposes of determining whether it is eligible for duty-free treatment under subheading 9802.00.90. HTSUS.

Since subheading 9802.00.90, HTSUS, was intended as a successor provision to subheading 9802.00.80, HTSUS, with respect to certain textile and apparel goods assembled in Mexico, the regulations under subheading 9802.00.80, HTSUS, may be instructive in determining whether a good is eligible for the beneficial duty treatment accorded by subheading 9802.00.90, HTSUS. (In this regard the new statute requires that all fabric components be formed and cut in the U.S., and that only such components (in whole or in part) need be exported from the U.S. in condition ready for assembly without further fabrication.)

Under section 10.14(a), Customs Regulations (19 CFR 10.14(a)), components may be subject to operations incidental to assembly before, during, or after the assembly with other components. Pursuant to section 10.16(a) of the Customs Regulations (19 CFR 10.16(a)), the assembly operations performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners, and may be preceded, accompanied, or followed by operations incidental to the assembly process. Examples of operations incidental to the assembly process are set forth under section 10.16(b), Customs Regulations (19 CFR 10.16(b)). The fifth example provides for adjustments in the shape or form of a component to the extent required by the assembly being performed abroad. *See* 19 CFR 10.16(b)(5).

As applied to the instant case, we find that folding, gluing, bending and similar processes used to produce the jewelry boxes from formed, die-cut components are acceptable assembly operations or operations incidental to assembly for purposes of determining eligibility of the articles for duty-free treatment under subheading 9802.00.90, HTSUS. Accordingly, the subject jewelry boxes will qualify for duty-free treatment under subheading 9802.00.90, HTSUS, provided all fabric components are wholly formed (woven or milled) and cut in the U.S.

Holding:

Jewelry boxes assembled in Mexico are classified under subheading 4202.92.90.15, HTSUS, which provides for trunks, suitcases, jewelry boxes and similar containers, with outer surface of textile materials, other, jewelry boxes of a kind normally sold with their containers. An article classified under this provision is considered a textile or apparel product. Therefore, since the operations performed in Mexico are acceptable assembly operations or operations incidental to assembly, the imported jewelry boxes will qualify for duty-free treatment under subheading 9802.00.90, HTSUS, provided all fabric components are cut and formed in the U.S.

Please provide a copy of this decision to Mr. Timothy Casey, Vice-President, Operations, Chippenhook Corp., 3105 Justin Road, Lewisville, Texas, 75067–3196.

CRAIG WALKER,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:SM 559856 DEC
Category: Classification
Tariff No. 9802.00.90

MR. RON GERDES
SANDLER, TRAVIS & ROSENBERG
1341 G Street, N.W.
Washington, DC 20005–3105

Re: Eligibility of pantyhose for duty-free treatment under subheading 9802.00.90; Textile or apparel good; Modification of HRL 559961 and HRL 559363; HRL 558708; HRL 557875; HRL 553105; *L'Eggs Products, Inc. v. United States*, 13 CIT 40, 704 F. Supp. 1127 (CIT 1989); subheading 9802.00.80, HTSUS; HRL 040242; HRL 041987; HRL 555446; Modification of HRL 732257; 19 CFR 1016(b)(6); 19 CFR 10.16(c)(4); 19 CFR 10.14.

DEAR MR. GERDES:

This is in response to a request for a binding ruling dated April 17, 1996, on behalf of Sara Lee Hosiery, Incorporated (SLH), concerning the eligibility of pantyhose subjected to processing in Mexico for duty-free treatment under subheading 9802.00.90, Harmonized Tariff Schedule of the United States (HTSUS). In addition, you supplemented your original ruling request with additional submissions dated September 23, 1996, and January 7, 1997, which provided supplementary information Customs requested as a result of our November 7, 1996, meeting at our office at which you and SLH representatives were present. A sample of the pantyhose, their component parts, and two videotapes describing the processing were submitted for our examination.

Facts:

You stated that SLH exports the following U.S.-origin components to Mexico: knitted tubes with a finished knitted waistband at one end and an open toe at the other (the tubes are made of knitted man-made fiber yarns (spandex, nylon, polypropylene)), garment labels, gusset material on rolls, and sewing yarn. The sewing operation in Mexico is performed using a linked pair of automatic sewing machines. The machine operator begins the process by loading two tubes onto the automatic arms of the Gusset Line Closer portion of the machine. The machine will slit the tubes lengthwise from the top to the crotch area and then separate them in preparation for gusset insertion. The gusset material is a small amount of cloth material that is inserted into the pantyhose for improved fit and reinforcement. The gusset material is on a roll and the machine will cut it to length at an angle. A separator spreads the gusset material open while a set of clamps holds the two slit tubes together. The gusset material is then inserted between the two tubes an after the air is blown under the gusset material, the machine will sew one side of the gusset to one tube. Another sewing unit sews the tubes together at the slit, sews the second side of the gusset to the second tube, and sews a label approximately two inches from the end seam.

The sewn pantyhose will be transferred to a tube closing machine known as a Too Closer machine. This machine will turn the pantyhose in-side out by means of a vacuum device, and then will position the tubes so that the machine may sew the open ends of the tubes closed. The pair of pantyhose is then deposited into a hosiery bag. Following inspection for

sewing and knitting defects, the finished pantyhose are packed for bulk shipment to the U.S. You state that the entire assembly process takes approximately 90 seconds to complete.

Issue:

Are the imported pantyhose described above eligible for duty-free treatment under subheading 9802.00.90, HTSUS, after being subjected to the processing described above?

Law and Analysis:

One of the special provisions contained in Annex 300–B of the North American Free Trade Agreement (NAFTA) is Appendix 2.4, which provides for the elimination of customs duties on textile and apparel goods that are assembled in Mexico from fabrics wholly formed and cut in the U.S. To implement this provision, a new tariff item was created in subheading 9802.00.90, HTSUS.

Subheading 9802.00.90, HTSUS, provides as follows:

> Textile and apparel goods, assembled in Mexico in which all fabric components were wholly formed and cut in the United States, provided that such fabric components, in whole or in part (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process; provided that goods classifiable in chapters 61, 62 or 63 may have been subject to bleaching, garment dyeing, stone-washing, acid-washing or perma-pressing after assembly as provided for herein.

"Textile and Apparel Good" under Subheading 9802.00.90, HTSUS

The initial question we must address is whether the pantyhose material knitted of man-made fiber yarns including spandex, nylon and polypropylene is considered a "textile and apparel good" under subheading 9802.00.90, HTSUS. Previous rulings on the issue of whether an article is a "textile and apparel good" for purposes of subheading 9802.00.90, HTSUS, have applied differing standards. Headquarters Ruling Letter (HRL) 559961, dated March 3, 1997, and HRL 559363, dated February 13, 1997, which addressed eligibility for certain articles for duty-free treatment under 9802.00.90, HTSUS, referenced section 102.21(b)(5), Customs Regulations (19 CFR 102.21(b)(5)) as the operative definition of a "textile and apparel good" for purposes of eligibility under subheading 9802.00.90, HTSUS. For purposes of implementing subheading 9802.00.90, HTSUS, however, Customs should have properly deferred to the terms provided for in the NAFTA. See HRL 558798, dated June 14, 1995, and HRL 557875, dated May 4, 1995.

Specifically, "textile and apparel goods" eligible for duty-free treatment under subheading 9802.00.90, HTSUS, are listed in Appendix 1.1 of Annex 300–B of the NAFTA. Chapter 61 of Appendix 1.1 includes various types of pantyhose the exact classification of which varies based on synthetic fiber yarn content. The subject pantyhose will qualify as a "textile and apparel good" since it is classified under heading 6115, HTSUS, and, therefore, eligible for duty-free treatment under subheading 9802.00.90, HTSUS. Customs hereby modifies HRL 559961 and HRL 559363 to incorporate the NAFTA definition of "textile and apparel goods" for purposes of subheading 9802.00.90, HTSUS, eligibility.

Acceptability of the Slitting and Sewing Operation under Subheadings 9802.00.80 and 9802.00.90, HTSUS

Customs has examined the slitting and sewing operation of pantyhose in various ruling letters some of which were issued to companies that have been acquired by SLH. For instance, Customs issued HRL 553105, dated December 31, 1984, to counsel on behalf of L'Eggs Products, Incorporated. SLH is an operating division of the Sara Lee Corporation which was formerly known as Consolidated Foods Corporation. On December 26, 1981, L'Eggs Products, Incorporated, was merged into Consolidated Foods Corporation and has since been a part of SLH.

In HRL 553105, Customs ruled that no duty allowance should be granted for the pantyhose tubes which were both slit and sewn together simultaneously. This position was challenged in the Court of International Trade, and the court, agreeing with the plaintiff, granted the duty allowance for U.S. articles assembled abroad. *L'Eggs Products, Inc. v. United States,* 13 CIT 40, 704 F. Supp. 1127 (CIT 1989)

In *L'Eggs, supra,* U.S.-origin components of pantyhose which consisted of two tubes, sewing yarn or thread, the gusset, and the garment labels were exported to be assembled.

Customs had allowed the cost of all of the components except the tubes to be deducted from the appraised value pursuant to item 807.00, Tariff Schedules of the United States (TSUS) (now subheading 9802.00.80, HTSUS). A review of the court documents in the L'Eggs case reveals that the processing of the nylon tubes abroad included the use of an "overedge" sewing machine which slit both tubes and sewed them together. See Attachment to *Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment* which describes the step-by-step processes performed on the exported components. Thus, the court was cognizant of the cutting and slitting operations performed on the pantyhose components. In finding for the plaintiff, the court concluded that the nylon tubes were fully fabricated components exported in condition ready for assembly, and the slitting and sewing operation was not cited as a further fabrication operation which would render the tubes ineligible for partial duty relief.

Prior to the *L'Eggs* decision, Customs issued HRL 040242, dated June 25, 1975, to counsel for Hanes Corporation which also is now owned by SLH. In HRL 040242, Customs determined that pantyhose tubes that were simultaneously slit through the U-shaped crotch area and seamed with overedge stitching was more than a mere trimming of a finished component. In addition, the closing of the open toe ends of the tubes which involved the sewing of one part of the pantyhose tube onto itself was determined not to be an assembly since it was not the fitting together of two or more components. Subsequently, Customs issued HRL 041987, dated September 19, 1975, which was issued to the same counsel on behalf of the Hanes Corporation. In this ruling, however, the Hanes Corporation proposed to perform the slitting operation at issue in HRL 040242 in the U.S. prior to the exportation of the tubes. Customs reversed its position in HRL 040242 and determined that the toe-closing operation did not preclude the partial duty allowance afforded U.S. articles that are sent abroad for assembly.

Subsequently, in HRL 555446, dated November 6, 1989, Customs issued another ruling on the eligibility of pantyhose for the partial duty exemption under subheading 9802.00.80, HTSUS. In HRL 555446, the toe ends of two tubes were sewn closed, the top portions of the tubes were slit lengthwise from the waistband to the crotch area, the tubes were then sewn together where the slit occurred, except where the crotch patch was inserted, and the crotch patch was then to be sewn into the crotch area, forming the completed article. Citing *L'Eggs* and *United States v. Oxford Industries, Inc.*[1] Customs determined that the tube closing operation constituted an assembly operation, and that the lengthwise slitting operation was a minor operation and was deemed to constitute an incidental operation. In addition, examination of the samples submitted in that case showed that the knitted tube and crotch patch components did not lose their physical identity in the assembly operation, and that they were not otherwise advanced in value or improved in condition except by assembly or operations incidental thereto.

In HRL 732257, dated May 16, 1990, Customs revisited the eligibility of pantyhose under subheading 9802.00.80, HTSUS. In HRL 732257, the manufacturing process consisted of knitting "tubes" of lycra and/or nylon in the U.S. and a separate patch for the crotch area. These separate pieces were then shipped to Mexico where the tubes were cut from the top opening to the crotch area, the separate pieces were sewn together and, in most cases, the assembled pantyhose were dyed. Thereafter, the assembled pantyhose were folded around a piece of cardboard, placed in a cellophane bag and shipped back to the U.S. Customs held that the components failed to meet the requirements of clause (a) of the tariff provision because they were not exported in a condition ready for assembly without further fabrication. Cutting the pantyhose tube was not deemed to be an acceptable assembly operation or operation incidental to assembly, but was determined to be a further fabrication of the pantyhose. The cutting operation was deemed not simply cutting a component to length, but was similar to cutting fabric for a specific pattern in order to sew the newly cut components together. *See* 19 CFR 10.16(c)(2). Furthermore, the dyeing operation disqualified the pantyhose from subheading 9802.00.80, HTSUS, treatment pursuant to 19 CFR 10.16(c)(4), which states that chemical treatment of components or assembled articles, such as dyeing, to impart new characteristics is not a proper operation incidental to the assembly process.

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[1] In United States v. Oxford Industries, Inc., 517 F. Supp. 694, 1 CIT 230 (1981), aff'd, 69 CCA 55, 668 F.2d 507 (1981), the court held that the slitting of fabric constituted an incidental operation where a buttonholing operation was performed by a machine which slit and stitched the cloth to form the button-hole in one continuous operation.

Therefore, the pantyhose did not qualify for the duty exemption available under subheading 9802.00.80, HTSUS.

In our opinion, the *L'Eggs* (1989) decision which was issued 14 years after HRL 040242 has effectively revoked the position articulated in HRL 040242 which stated, in part, that the simultaneous slitting and sewing operation precluded the eligibility of the pantyhose tubes from the partial duty allowance. HRL 732257 which was issued in 1990 is inconsistent with the Court of International Trade's decision in *L'Eggs* and HRL 555446. HRL 732257 is hereby modified to reflect the position which implicitly flows from *L'Eggs* that the slitting and sewing of pantyhose tubes alone is not a further fabrication rendering the pantyhose tubes ineligible for partial duty relief pursuant to subheading 9802.00.80, HTSUS. We note that the result in HRL 732257 does not change because the assembled pantyhose were also dyed. Customs determined that the dyeing is not a proper operation incidental to the assembly process pursuant to 19 CFR 10.16(c)(4). Therefore, the pantyhose in HRL 732257 where properly precluded from the duty allowance available under subheading 9802.00.80, HTSUS.

Turning to the issue of eligibility of the pantyhose tubes under subheading 9802.00.90, HTSUS, we are mindful of the fact that because subheading 9802.00.90, HTSUS, was intended as a successor provision to subheading 9802.00.80, HTSUS, with respect to certain textile and apparel goods assembled in Mexico, the regulations under subheading 9802.00.80, HTSUS, may be instructive in determining whether a good is eligible for the beneficial duty treatment accorded by subheading 9802.00.90, HTSUS. As distinguished from subheading 9802.00.80, HTSUS, however, it is noted that the new statute requires that all fabric components be formed and cut in the U.S., and that only such components, in whole or in part, must satisfy the three conditions set forth in (a)–(c) of the statute. HRL 558708, dated June 14, 1995.

Accordingly, it is our position that consistent with *L'Eggs* and HRL 555446, the slitting and sewing operations do not constitute a further fabrication of the nylon tubes. Rather, this operation is an operation incidental to the assembly of the pantyhose. *See* 19 CFR 10.14(a). Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations, although they may precede, accompany or follow the actual assembly operation. 19 CFR 10.16(a).

Acceptability of the Cutting of the Gusset material under Subheadings 9802.00.80 and 9802.00.90, HTSUS

The next issue in this case is whether the cutting of the gusset material in Mexico at an angle so that the cut size conforms to the requirements of the pantyhose design precludes the eligibility of the pantyhose for subheading 9802.00.90, HTSUS, treatment on the ground of being "not incidental to the assembly process." Based on our review of the history of subheading 9802.00.90, HTSUS, and the stated objective that subheading 9802.00.90, HTSUS, was intended as a successor provision to subheading 9802.00.80, HTSUS, it is our position that 19 CFR 10.16 is instructive with regard to the types of operations that Customs will find to be incidental to the assembly. Section 10.16 states, in pertinent part, that:

> (b) Operations incidental to the assembly process. Operations incidental to the assembly process whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption. The following are examples of operations which are incidental to the assembly process:
>
> * * * * * * *
>
> (6) Cutting to length of wire, thread, tape, foil, and similar products exported in continuous length; separation by cutting of finished components, such as prestamped integrated circuit lead frames exported in multiple unit strips * * *.

Notwithstanding the fact that the cotton gusset material is cut at an angle, the cutting-to-length of the continuous rolls of the gusset material is a straight cutting operation which is not cutting to shape or a further fabrication that would exceed the parameters of 19 CFR 10.16(b)(6). Accordingly, we find that the cutting operation of the gusset material is an operation incidental to the assembly and should not preclude its eligibility under subheading 9802.00.90, HTSUS.

Holding:

Provided that the pantyhose components are formed and cut in the U.S. prior to export to Mexico, the pantyhose components assembled in Mexico as described above may be entered

Customs had allowed the cost of all of the components except the tubes to be deducted from the appraised value pursuant to item 807.00, Tariff Schedules of the United States (TSUS) (now subheading 9802.00.80, HTSUS). A review of the court documents in the L'Eggs case reveals that the processing of the nylon tubes abroad included the use of an "overedge" sewing machine which slit both tubes and sewed them together. See Attachment to *Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment* which describes the step-by-step processes performed on the exported components. Thus, the court was cognizant of the cutting and slitting operations performed on the pantyhose components. In finding for the plaintiff, the court concluded that the nylon tubes were fully fabricated components exported in condition ready for assembly, and the slitting and sewing operation was not cited as a further fabrication operation which would render the tubes ineligible for partial duty relief.

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[1] In United States v. Oxford Industries, Inc., 517 F. Supp. 694, 1 CIT 230 (1981), aff'd, 69 CCA 55, 668 F.2d 507 (1981), the court held that the slitting of fabric constituted an incidental operation where a buttonholing operation was performed by a machine which slit and stitched the cloth to form the button-hole in one continuous operation.

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Turning to the issue of eligibility of the pantyhose tubes under subheading 9802.00.90, HTSUS, we are mindful of the fact that because subheading 9802.00.90, HTSUS, was intended as a successor provision to subheading 9802.00.80, HTSUS, with respect to certain textile and apparel goods assembled in Mexico, the regulations under subheading 9802.00.80, HTSUS, may be instructive in determining whether a good is eligible for the beneficial duty treatment accorded by subheading 9802.00.90, HTSUS. As distinguished from subheading 9802.00.80, HTSUS, however, it is noted that the new statute requires that all fabric components be formed and cut in the U.S., and that only such components, in whole or in part, must satisfy the three conditions set forth in (a)–(c) of the statute. HRL 558708, dated June 14, 1995.

Accordingly, it is our position that consistent with *L'Eggs* and HRL 555446, the slitting and sewing operations do not constitute a further fabrication of the nylon tubes. Rather, this operation is an operation incidental to the assembly of the pantyhose. *See* 19 CFR 10.14(a). Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations, although they may precede, accompany or follow the actual assembly operation. 19 CFR 10.16(a).

Acceptability of the Cutting of the Gusset material under Subheadings 9802.00.80 and 9802.00.90, HTSUS

The next issue in this case is whether the cutting of the gusset material in Mexico at an angle so that the cut size conforms to the requirements of the pantyhose design precludes the eligibility of the pantyhose for subheading 9802.00.90, HTSUS, treatment on the ground of being "not incidental to the assembly process." Based on our review of the history of subheading 9802.00.90, HTSUS, and the stated objective that subheading 9802.00.90, HTSUS, was intended as a successor provision to subheading 9802.00.80, HTSUS, it is our position that 19 CFR 10.16 is instructive with regard to the types of operations that Customs will find to be incidental to the assembly. Section 10.16 states, in pertinent part, that:

> (b) Operations incidental to the assembly process. Operations incidental to the assembly process whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption. The following are examples of operations which are incidental to the assembly process:
>
> * * * * * * *
>
> (6) Cutting to length of wire, thread, tape, foil, and similar products exported in continuous length; separation by cutting of finished components, such as prestamped integrated circuit lead frames exported in multiple unit strips * * *.

Notwithstanding the fact that the cotton gusset material is cut at an angle, the cutting-to-length of the continuous rolls of the gusset material is a straight cutting operation which is not cutting to shape or a further fabrication that would exceed the parameters of 19 CFR 10.16(b)(6). Accordingly, we find that the cutting operation of the gusset material is an operation incidental to the assembly and should not preclude its eligibility under subheading 9802.00.90, HTSUS.

Holding:

Provided that the pantyhose components are formed and cut in the U.S. prior to export to Mexico, the pantyhose components assembled in Mexico as described above may be entered

free of duty under subheading 9802.00.90, HTSUS, since they are exported in condition ready for assembly without further fabrication, have not lost their physical identity by change in form, shape, or otherwise, and have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, September 3, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MARVIN M. AMERNICK,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

PROPOSED REVOCATION OF RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF A WOMEN'S KNIT SWEATER

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a women's knit sweater.

DATE: Comments must be received on or before October 17, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Tariff Classification Appeals Division (202) 482–6996.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke District Decision (DD) 811349, dated July 3, 1995, pertaining to the tariff classification of a women's knit sweater.

In DD 811349, Customs incorrectly classified the garment as a sweater of other textile materials under subheading 6110.90.9042 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). DD 811349 is set forth as "Attachment A" to this document. The garment is correctly classified as a sweater of man-made fibers under subheading 6110.30.3020, HTSUSA. Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 959828 revoking DD 811339 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.0), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 2, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Miami, FL, July 3, 1995.

CLA–2–61–DD:C:D I:I22 811349
Category: Classification
Tariff No. 6110.90.9042

SUBHASH BHATIA
CALIFORNIA FASHION INDUSTRIES, INC.
102 East King Boulevard
Los Angeles, CA 90011–2699

Re: The tariff classification of a women's knit sweater from Hong Kong.

DEAR SUBHASH BHATIA:

In your letter dated June 6, 1995, you requested a tariff classification ruling.

The submitted sample, style number H–112, is a women's sweater made of 38 percent silk, 26 percent rayon, 22 percent ramie, 13 percent acrylic and 1 percent cotton knit fabric. The fabric contains 9 or fewer stitches per 2 centimeters when measured in the direction the stitches were formed.

The garment features a full front opening with three button closures and a drawstring, a shawl style collar, long sleeves and beading. Your sample will be returned as requested.

The applicable subheading will be 6110.90.9042, Harmonized Tariff Schedule of the United States (HTS), which provides for sweaters, pullovers, sweatshirts, waistcoats and similar articles, knitted or crocheted, of other textile materials, other, sweaters, women's or girls', other. The rate of duty will be 6 percent *ad valorem*.

The sweater falls within textile category 845. Based upon international trade agreements, products of Hong Kong are subject to the requirement of a visa and quota restraints.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the entry documents are filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

D. LYNN GORDON,
District Director,
Miami District.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 959828 RH
Category: Classification
Tariff No. 6110.30.3020

MR. SUBHASH BHATIA
CALIFORNIA FASHION INDUSTRIES, INC.
102 East King Boulevard
Los Angeles, CA 90011–2699

Re: Revocation of DD 811349; tariff classification of a women's knit sweater; Note 2, Section XI; Subheading Note 2(A), Section XI.

DEAR MR. SUBHASH BHATIA:

On July 3, 1995, Customs issued District Decision (DD) 811349 to your company regarding the tariff classification of a women's knit sweater from Hong Kong. Customs classified the sweater under subheading 6110.90.9042 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

We have reviewed that decision and found that the sweater was not properly classified. This ruling, therefore, revokes DD 811349 and sets forth the proper classification of the sweater.

Facts:

A description of the sweater in DD 811349 is as follows:

> The submitted sample, style number H–112, is a women's sweater made of 38 percent silk, 26 percent rayon, 22 percent ramie, 13 percent acrylic and 1 percent cotton knit fabric. The fabric contains 9 or fewer stitches per 2 centimeters when measured in the direction the stitches were formed.
>
> The garment features a full front opening with three button closures and a drawstring, a shawl style collar, long sleeves and beading * * *.

Issue:

What is the correct tariff classification of the subject sweater constructed of five different textile materials (silk, rayon, ramie, acrylic and cotton)?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the

terns of the headings and any relative section or chapter notes. Heading 6110 encompasses knitted or crocheted sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles.

Classification of a sweater according to its fabric occurs at the subheading or six-digit level. As the sweater in question contains five textile materials, we must determine which one confers classification. Subheading Note 2 to Section XI, HTSUSA, provides in pertinent part:

> (A) Products of chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under note 2 to this section for the classification of a product of chapters 50 to 55 consisting of the same textile materials.

Legal Note 2(A) and 2(B)(b) and (c), to Section XI, HTSUSA, state, in pertinent part:

> (A) Goods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other single textile material. When no one textile material predominates by weight, the goods are to be classified as if consisting wholly of that one textile material which is covered by the heading which occurs last in numerical order among those which equally merit consideration.
>
> (B) For the purposes of the above rule:
>
> * * * * * * *
>
> (b) The choice of appropriate heading shall be effected by determining first the chapter and then the applicable heading within that chapter, disregarding any materials not classified in that chapter;
>
> (c) When both chapters 54 and 55 are involved with any other chapter, chapters 54 and 55 are to be treated as a single chapter.

In the submitted sample the sweater is composed of 38 percent silk, 26 percent rayon, 22 percent ramie, 13 percent acrylic and 1 percent cotton. Acrylic and rayon fibers and yarns are classifiable in chapters 54 and 55. The cotton, silk and ramie fibers and yarns are classifiable in chapters 52, 50 and 53, respectively. In this instance, therefore, only the rayon and acrylic materials are treated as a single textile material in accordance with Legal Note 2(B)(c) to Section XI. The combination of those two man-made textile materials equals 39 percent of the total weight of the sweater and predominates by weight over the silk, ramie and cotton materials.

Holding:

The sweater is classifiable under subheading 611.30.3020, HTSUSA, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of man-made fibers: Other: Other: Other: Other: Women's." It is dutiable at the general column rate of 33.5 percent *ad valorem* and the textile category number is 646.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–111)

SDI TECHNOLOGIES INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–01–00014

[Judgment entered for defendant.]

(Dated August 7, 1997)

Sharretts, Paley, Carter & Blauvelt, P.C. (Peter Jay Baskin and Kenneth R. Paley) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Susan Burnett Mansfield);* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Mark G. Nackman)*, of counsel, for defendant.

OPINION

GOLDBERG, *Judge:* Plaintiff, SDI Technologies, Inc. ("SDI"), claims that defendant, the United States Customs Service ("Customs"), improperly declined to classify articles imported from Mexico to the United States as exempt from duty under the Generalized System of Preferences ("GSP"), 19 U.S.C. § 2463(b) (Supp. II 1990). At issue is whether the goods imported from Mexico are "products of" Mexico for GSP purposes. To make this determination, the Court must decide if goods imported into Mexico from China were substantially transformed in Mexico before being exported to the United States. This Court finds that the goods were not substantially transformed in Mexico, and therefore holds that Customs correctly denied GSP status to the articles when they were imported to the United States.

BACKGROUND

SDI, formerly known as "Soundesign," is a consumer electronic manufacturer and distributor, whose major production in the past has included audio rack systems, CD players, "boom boxes," clock radios, telephones, and VCRs. Oral Test. of Mr. Edward Kurowski (expert wit-

ness for SDI) (Nov. 19, 1996) ("Kurowski Test."). The subject goods, model numbers 46C46M1 and 63R63M, are imported into the United States from Mexico, and sold by SDI as "rack stereo systems." Legal Mem. Supp. Pl.'s Claims at 1. The subject goods consist of a center console, which houses the electronic equipment, and two speakers. *Id.* The major difference between models is that the speakers for model 46C46M1 are attached to the console by hinges, while the speakers for model 63R63M are free standing.

SDI's manufacturing operation in Juarez, Mexico consisted of laminating imported raw particle board, cutting and grooving this board, molding plastic components, cutting and painting imported foam, and finally joining these parts "with other components that did not require additional processing prior to the assembly of the rack stereo systems." Legal Mem. Supp. Pl.'s Claims at 3; *accord* Kurowski Test. Components that did not require "additional processing" included the audio electronics for each system, "*i.e.*, unhoused printed circuit board assemblies with face-plate incorporating components for radio receivers [and] duel cassette decks," and the raw speaker cones. Legal Mem. Supp. Pl.'s Claims at 3. Both the former elements, which SDI terms a "chassis," and the raw speaker cones were imported from China. Kurowski Test. The audio electronics were complete and fully functional when they were imported into Mexico. Oral Test. of Mr. Edward John Foster (expert witness for Customs) (Nov. 19, 1996). At the end of the process, the fully assembled subject goods were packaged in boxes marked "Stereo Music Center," Def.'s Ex. 21, and imported into the United States.

The subject goods were imported to the United States between 1990 and 1992. Customs withheld liquidation of the entries while awaiting a ruling on whether the goods were eligible for duty-free entry under the GSP. Customs Ruling HQ 556699 denied duty-free status to the goods pursuant to the GSP, 19 U.S.C. § 2463(b), and Customs accordingly assessed a duty of 3.7% *ad valorem*.[1] Legal Mem. Supp. Pl.'s Claims at 6–7. SDI filed a timely protest which Customs denied. SDI then initiated this case, claiming that Customs improperly denied duty-free status to the subject goods. This Court finds that Customs acted correctly. The Court exercises jurisdiction under 28 U.S.C. § 1581(a) (1994).

STANDARD OF REVIEW

Custom's factual determinations upon which it based its decision to deny duty-free treatment are entitled to a statutory presumption of correctness. 28 U.S.C. § 2639(a)(1) (1994) (describing presumption); *Good-*

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[1] 19 U.S.C. § 2463(b) provides in part:

> (1) The duty-free treatment provided under section 2461 of this title shall apply to any eligible article which is the *growth, product, or manufacture* of a beneficiary developing country if—
>
> (A) that article is imported directly from a beneficiary developing country into the customs territory of the United States; and
>
> (B) the sum of (i) the cost or value of the materials produced in the beneficiary developing country or any 2 or more countries which are members of the same association of countries which is treated as one country under section 2462(a)(3) of this title, plus (ii) the direct costs of processing operations performed in such beneficiary developing country or such member countries is not less than 35 percent of the appraised value of such article at the time of its entry into the customs territory of the United States.

19 U.S.C. § 2463(b)(emphasis added).

man Mfg., L.P. v. United States, ___ Fed. Cir. (T) ___, ___, 69 F. 3d 505, 508 (1995). *See also Aurum Jewelers, Inc. v. United States*, ___ CIT ___, ___, Slip Op. 97–47 at 4 (Apr. 21, 1997) (applying the statutory presumption of correctness in a GSP case); *Haggar Apparel Co. v. United States*, ___ CIT ___, ___, 938 F. Supp. 868, 869–70 (1996) (same). SDI thus bears the burden of proving the Custom's determination is incorrect.

DISCUSSION

Congress originally enacted the GSP program "to extend preferential tariff treatment to the exports of less-developed countries to encourage economic diversification and export development within the developing world." S. Rep. No. 93–1298, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7187. The GSP provides that certain "eligible articles" may be imported into the United States duty-free if they meet three requirements. First, the article must be the "growth, product or manufacture" of a beneficiary developing country ("BDC"). 19 U.S.C. § 2463(b)(1); *see also* 19 U.S.C. § 2463(b)(2). Second, the article must be imported directly from a BDC into the customs territory of the United States. *Id.* § 2463(b)(1)(A). Third, the sum of the cost or value of the material produced in the BDC plus the direct costs of processing operations performed in the BDC must not be less than thirty-five percent of the appraised value of such article at the time of its entry into the customs territory of the United States. *Id.* § 2463(b)(1)(B).

Both parties agree that for the purposes of the GSP, Mexico was a BDC for the years 1990, 1991, and 1992, and that for these years, the stereo rack systems were eligible articles for duty-free treatment. Compl. at 2–3, nos. 11–12; Answer at 1–2, nos. 11–12. Likewise, both parties have stipulated that the subject goods were imported directly from a BDC into the customs territory of the United States, and that the thirty-five percent requirement is met. Def.'s Pretrial Mem. at 6. Hence, the only issue in this case is whether the subject goods are the growth, product, or manufacture of Mexico.

To be considered the growth, product, or manufacture of a BDC for GSP purposes, goods imported into the BDC from a third, non-BDC country must undergo a "substantial transformation" in the BDC before they are imported to the United States.[2] *Zuniga*, ___ Fed. Cir. (T) at ___, 996 F. 2d at 1206 (citing *Azteca Milling Co. v. United States*, 8 Fed. Cir. (T) 13, 14, 890 F. 2d 1150, 1151 (1989)). "[S]ubstantial transformation occurs when an article emerges from a manufacturing process with a name, character, or use which differs from those of the

[2] A substantial transformation test is used in a number of different trade-related situations, including compliance with the country of origin marking statute, allowance of drawback, and qualification for GSP status. *National Juice Prod. Ass'n. v. United States*, 10 CIT 48, 58 n.14, 628 F. Supp. 978, 988 n.14 (1986). While the tests applied to establish conformance with these three statutes are similar, the outcomes may differ because the statutes differ both in language and in purpose. *Id.* Each case must be evaluated on its own particular set of facts to determine whether an article has been substantially transformed irrespective of the statute. *Uniroyal, Inc. v. United States*, 3 CIT 220, 224, 542 F. Supp. 1026, 1029 (1982) (citations ommitted), *aff'd*, 3 Fed. Cir. (T) 21, 702 F. 2d 1022 (1983); *see F.F. Zuniga v. United States*, ___ Fed. Cir. ___, ___, 996 F.2d 1203, 1206 (1993) (determining whether articles were substantially transformed "requires findings of fact by the trial court").

original material subjected to the process." *Torrington v. United States*, 3 Fed. Cir. (T) 158, 163, 764 F. 2d 1563, 1568 (1985) (citation omitted). However, because "[t]he article need not experience a change in name, character, *and* use to be substantially transformed," all three of these elements need not be met before a court may find substantial transformation. *Koru North America v. United States*, 12 CIT 1120, 1126, 701 F. Supp. 229, 234 (1988) (emphasis added) (citation omitted).

SDI claims that the goods satisfy the GSP's requirement that they be the "growth, product, or manufacture" of a BDC because the chassis, of Chinese origin, were substantially transformed into a different product in Mexico before they were exported to the United States because the chassis changed in name, character, and use. Legal Mem. Supp. Pl.'s Claims at 8, 11. This Court is unpersuaded by SDI's arguments, and finds that because neither the character nor the use of the chassis changed when it became a stereo rack system, the chassis did not undergo substantial transformation.[3] The Court addresses each element in turn.

A. *The Subject Goods Have Not Undergone a Change in Character:*

SDI argues that the subject goods have undergone a change in character on two levels: first, it asserts that, like the goods in *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), the chassis here have changed from producers' goods to consumers' goods; and second, SDI claims that the chassis have changed from articles that are "fragile," "unsafe," and low in value, to "completed products" with "a finished appearance" which are both durable and "entirely safe," with a value roughly double the value of the chassis. Legal Mem. Supp. Pl.'s Claims at 15–16. The Court finds these arguments to be without merit, and discusses each in turn.

SDI first asserts that when an article has been refined from a producers' good to a consumers' good, the article *a fortori* has undergone a change in character. SDI then attempts to characterize the chassis as imported into Mexico as producers' goods, and the stereo rack systems as exported from Mexico into the United States as consumers' goods. Yet the court has never held that the producer/consumer shift alone is dispositive. *See Uniroyal*, 3 CIT at 223–24, 542 F. Supp. at 1029–30 (holding that imported shoe uppers were not substantially transformed when the importer attached soles even though the goods changed from a producers' good to a consumers' good). Moreover, this Court rejects SDI's suggestion that the producer/consumer shift alone qualifies an article for duty-free status. Quite simply, it proves too much: by SDI's argu-

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[3] The Court does not reach whether there has been a change in name because while a change in name can serve as evidence of substantial transformation, alone it is usually not dispositive. *Superior Wire v. United States*, 11 CIT 608, 614, 669 F. Supp. 472, 478 (1987), *aff'd*, 7 Fed. Cir. (T) 43, 867 F. 2d 1409 (1989). *See also National Juice Prod.*, 10 CIT at 59, 628 F. Supp. at 989 (citation omitted)(concluding that a change in the name of a product is the "weakest evidence of substantial transformation"); *Uniroyal*, 3 CIT 220, 542 F. Supp. 1026 (finding that a product did not undergo substantial transformation even though its name changed from "upper" to "shoe"); *United States v. Int'l Paint Co.*, 35 C.C.P.A. 87, 93–94 (1948) ("Under some circumstances a change in name would be wholly unimportant, and equally so is a lack of change in name under circumstances such as [in this drawback case]."). Thus, although the parties disagree over the proper use of the term "chassis" as it pertains to the electronic equipment, the Court does not reach whether the subject goods' name has changed.

ment, virtually any unfinished product that is finished by a producer before it is sold to a consumer would have undergone substantial transformation.

Nevertheless, the Court still recognizes that the producer/consumer shift does have some evidentiary value. Even so, SDI's reliance on *Midwood Industries*, 64 Cust. Ct. 499, 313 F. Supp. 951, is misplaced. Unlike the present case, the goods in *Midwood Industries* were not in their finished form, and they were neither "used by the consumer * * * [nor] capable of use by the consumer" in the state in which they were imported into the BDC. 64 Cust. Ct. at 507, 313 F. Supp. at 957. Here, however, the chassis imported into Mexico from China were the fully-functional electronic components of the stereo rack systems, capable of use by the consumer in the state in which they arrived in Mexico. Indeed, the chassis underwent no changes before they were housed, paired with speakers, and renamed "stereo rack systems."

SDI next claims that the subject goods have undergone a change in character because the chassis have been transformed from items that are "fragile," "unsafe," and low in value, to "completed products" with "a finished appearance" which are durable and "entirely safe" with a value roughly double that of the value of the chassis. Legal Mem. Supp. Pl.'s Claims at 15–16. However, SDI does not offer the Court any support for the proposition that these changes are proof of a change in character, and the Court declines to expand our formulation of the name, character, and use test to include these elements.

Additionally, the Court finds that, because the essence of the chassis remains the same, its character has not changed. While the Court acknowledges that a change in essence is not always a necessary prerequisite to a change in character, a lack of a change in essence evidences a lack of a change in character.[4] The relation between essence and character is apparent in *Webster's New World Dictionary* which defines "character" as "a distinctive trait, quality, or attribute; characteristic" or "essential quality." *Webster's New World Dictionary* 235 (3d. C. ed. 1988). This Court finds no evidence of a change in essence of the goods during the process in which the chassis became a stereo rack system. When it was imported into Mexico, the chassis contained all of the electronics in the rack system, and were completely functional.[5] The stereo rack systems, as exported from Mexico into the United States, were packaged with descriptive brochures that identified the stereo rack systems predominately by these same electronic components. The stores in the United States that retailed the subject goods did so in their electronic departments. Consumers bought the goods principally for use as ste-

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[4] SDI asserts that Customs may not use an "essence test" to assess substantial transformation because of the holding in *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 664 F. Supp. 535, (1987), which SDI claims "summarily dismissed" such an argument. Legal Mem. Supp. Pl.'s Claims at 22. SDI's argument, however, is flawed on two levels: first, it does not acknowledge that *Ferrostaal* affirms *National Juice Products'* use of an essence test to determine if there had been a change in character; and second, it does not acknowledge that *Ferrostaal* concedes that *Uniroyal* used the "essence" of the good to establish substantial transformation resulting from a change in name, character, or use. *Ferrostaal*, 11 CIT at 473–74, 664 F. Supp. at 538.

[5] The only exception is the electronics in the speakers, which were also of Chinese origin. Kurowski Test.

reo receivers and tape decks. The essence of the goods, stereo receivers and tape players, did not change when the chassis were housed in the wood-laminate cabinets.

B. *The Subject Goods Have Not Undergone a Change in Use:*

SDI also argues that the chassis have undergone a substantial transformation because their use has changed in three distinct manners. First, SDI asserts that before it completed the assembly process, the chassis functioned only as an audio recording and reproduction device, yet after the addition of two speakers, the chassis were transformed, gaining the ability to produce sound, and thus became capable of "audio entertainment." Legal Mem. Supp. Pl.'s Claims at 16. The Court finds this argument unpersuasive: under this analysis *any* stereo system without speakers would be considered only an audio recording and reproduction device. Indeed, if SDI's analysis were carried to its logical conclusion, a stereo system could be substantially transformed by simply adding or removing speakers, or even headphones. However, such ease of transformation is clearly ruled out by 19 U.S.C. § 2463(b)(2) which states that "no article or material of a beneficiary developing country shall be eligible for GSP treatment by virtue of having merely undergone [ ] [a] simple combining or packaging operation[ ]." *See also Torrington*, 3 Fed. Cir. (T) at 167, 764 F. 2d at 1571. (The production process must be a "significant manufacturing process, and not a mere 'pass-through' operation" to be considered substantial transformation.).

Second, SDI contends that it has transformed the chassis into furniture. However, SDI's commitment to this argument is belied both by the packaging insert it includes with the system, and by the manual provided to the repair personnel. The former congratulates the owners on their purchase of electronics, and the latter lays out how to fix the electronics—neither mentions the wood-laminate housing. *See* Def.'s Exs. E-K.

Third and finally, SDI claims that there has been a change in use because when the chassis were imported into Mexico, they were capable of being used for a number of products, but that after they "were subjected to the Plaintiff's manufacturing process, they were dedicated to only one use, *i.e.*, as integral parts of the center console of the subject rack stereo systems." Legal Mem. Supp. Pl.'s Claims at 17, (citing *Ferrostaal*, 11 CIT at 477, 664 F. Supp. at 541). However, SDI's reliance on *Ferrostaal* is misplaced. In *Ferrostaal* the court found a change in use because the pre-processed product generally "is not put to end uses without some form of [processing]." *Ferrostaal*, 11 CIT at 477, 664 F. Supp. at 541. In fact, the goods in *Ferrostaal* could not be used in the same manner after processing. *Id.* 11 CIT at 477, 664 F. Supp. at 540–41. However, in the present case, the end use of the chassis remains the same. Before its incorporation into the stereo rack system, the chassis was a recording and receiving device with the ability to produce sound once speakers

were attached. After it was incorporated into the stereo rack system, its use was exactly the same.

C. *The Court's Finding is Consistent With the Statute's Purpose:*

Finally, the Court notes that its holding is fully consistent with the statutory purpose of the GSP. As noted previously, the GSP program was designed to encourage BDCs to produce goods for export, thereby fostering economic diversification and industrialization. S. Rep. No. 93–1298, at 5, 1974 U.S.C.C.A.N. at 7187; *Torrington*, 3 Fed. Cir. (T) at 167, 764 F. 2d at 1563 (The "fundamental purpose" of the GSP is "fostering industrialization in BDCs."). Hence, it is against this backdrop that the Court assesses whether an article has been substantially transformed. *Id.* 3 Fed. Cir. (T) at 167, 764 F. 2d at 1563.

Previous courts have evaluated several factors to determine whether the production operation at issue promotes the purposes of the GSP. One such factor is the number of employees that require technical training to perform their jobs, and whether this technical training will "lay[ ] the groundwork for the acquisition of even higher skills and more self-sufficiency." *See, e.g., Texas Instruments Inc. v. United States*, 69 C.C.P.A. 151, 160, 681 F. 2d 778, 785 (1982). The GSP program, therefore, is not meant to encourage an increase in the number of simple labor intensive jobs within a BDC.

Applying these factors here, the Court concludes that the production operation fails to satisfy the purpose of the GSP. In the instant case the complex manufacturing took place in China. Moreover, the majority of the operations in SDI's plant in Juarez, Mexico only required a skill level of a first to sixth grade education. Kurowski Test. Accordingly, this Court finds that the purpose of the GSP is not met through the jobs that SDI created.

CONCLUSION

This Court finds that Customs correctly determined that the subject goods have not undergone substantial transformation, and therefore are not "products of" Mexico entitled to be duty-free under the GSP. Judgment will be entered accordingly.

(Slip Op. 97–112)

ABRAHAM FRIEDMAN, PLAINTIFF *v.* MICKEY KANTOR, DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, U.S. INTERNATIONAL TRADE COMMISSION, DEPARTMENT OF STATE, AND U.S. TRADE REPRESENTATIVE, DEFENDANTS

Court No. 96–07–01787

[Defendant's Motion To Dismiss for lack of jurisdiction granted; transfer to a federal district court denied.]

(Decided August 11, 1997)

Wasserman, Schneider & Babb (Patrick C. Reed) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David W. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis*, Assistant Director), and *Lyn M. Schlitt*, General Counsel, *James A. Toupin*, Assistant General Counsel, United States International Trade Commission *(Gail Usher*, Attorney); and Office of Chief Counsel for Import Administration, United States Department of Commerce *(David W. Richardson*, General Attorney), Office of the Assistant Legal Adviser for Economic, Business, and Communications Affairs, United States Department of State *(Keith Loken*, Attorney Adviser), and Office of the United States Trade Representative *(Kenneth Freiberg*, Deputy General Counsel), of counsel, for defendant.

OPINION

INTRODUCTION

WALLACH, *Judge:* Plaintiff Abraham Friedman brought this action pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* (1994), to compel Defendant agencies to assist him with his business difficulties in Mexico. Defendants moved to dismiss the case for lack of subject matter jurisdiction, lack of standing and failure to state a claim upon which relief can be granted. Plaintiff claims jurisdiction is proper under 28 U.S.C. § 1581(i) (1994), but also requests that the case be transferred to a federal district court if this Court determines that it lacks jurisdiction.

Defendant's Motion To Dismiss for lack of jurisdiction is granted because this action does not arise from a law providing for an "embargo" within the meaning of section 1581(i), and, additionally, Plaintiff has failed to satisfy the standing requirement of 28 U.S.C. § 2631(i) (1994) with respect to two of his three claims under the APA. Since these claims are non-justiciable and the agency inaction alleged in the remaining claim appears to be unreviewable, transfer of the case would not be in the interest of justice, and is therefore denied.

BACKGROUND

Plaintiff commenced this action on May 8, 1996 as a *pro se* plaintiff by filing two Summons and a Complaint, challenging agency inaction.[1]

[1] Plaintiff also filed a Motion To Proceed *In Forma Pauperis*, which this Court granted on Aug. 27, 1996.

One of the Summons and the Complaint named Mickey Kantor, the Department of Commerce ("Commerce"), the International Trade Administration, the U.S. International Trade Commission, the Department of State, and the U.S. Trade Representative ("USTR") as Defendants (hereinafter "Defendants" or "Defendant agencies"). Defendants responded to the Complaint by moving to dismiss for lack of jurisdiction, lack of standing and failure to state a claim upon which relief can be granted.

This Court appointed counsel to represent Plaintiff on a *pro bono* basis. Plaintiff, by his court-appointed attorney, clarified that the Complaint set forth the following claims: (1) that Commerce did not pursue Plaintiff's petition to impose antidumping duties against imports of shopping carts; (2) that Commerce did not provide trade adjustment assistance to Plaintiff; and (3) that officials of the Commerce and State Departments in Monterrey, Mexico City, and in Washington, D.C., as well as officials of the USTR, declined to help Plaintiff after his business in Mexico encountered difficulties. Plaintiff's Opposition To Defendants' Motion To Dismiss ("Plaintiff's Opposition") at 2.

Plaintiff effectively abandoned the first two claims (antidumping and trade assistance) raised in the Complaint.[2] Consequently, the only issue before the Court is Plaintiff's contention that he was denied assistance by Defendant agencies in violation of applicable statutes and regulations, which include 15 U.S.C. § 4721(b) (1994), 19 U.S.C. § 2171(c) (1994), and 22 C.F.R. §§ 101.1 and 101.3 (1995) (defining, respectively, functions of the United States and Foreign Commercial Service ("Commercial Service") within Commerce's International Trade Administration, the USTR, and Foreign Service Officers ("FSOs")). Since neither of these statutes or regulations creates a private right of action, Plaintiff relies on the Administrative Procedure Act (APA), which recognizes a private right of action to compel unlawfully withheld agency action.[3] 5 U.S.C. §§ 702, 706. Finally, Plaintiff contends that this action is within the Court's jurisdiction under 28 U.S.C. § 1581(i), but requests that if the Court finds otherwise, it should transfer the case to a federal district court, rather than dismiss it. Plaintiff's Opposition at 4–6.

Mr. Friedman's Affidavit states that Plaintiff is a minority shareholder and corporate General Manager of a company in Monterrey, Mexico, established in the late 1980's to manufacture household steel articles, such as ironing boards, step ladders, and shopping carts. Friedman Affidavit, attached to Plaintiff's Opposition, at ¶ 3. Plaintiff claims the Mex-

[2] Plaintiff conceded that "there is no basis warranted under the law for opposing the motion to dismiss [P]laintiff's claim relating to the request for antidumping relief and [P]laintiff's claim for trade adjustment assistance." Plaintiff's Opposition at 3. The admission seems justified in light of evidence that Plaintiff filed an antidumping petition with Commerce regarding imported shopping carts on January 10, 1991, but withdrew the petition before Commerce or the International Trade Commission took further action. *See Certain Shopping Carts from China and Taiwan: Institution of preliminary antidumping investigations*, 56 Fed. Reg. 1649 (Jan. 16, 1991); Friedman's letter of January 30, 1991, Ex. 2 to Defendants' Motion to Dismiss; *Certain Shopping Carts From China and Taiwan: Notice of withdrawal of petition in anti-dumping investigations*, 56 Fed. Reg. 4852 (Feb. 6, 1991). Thus, there can be no failure on the part of Commerce to pursue an antidumping investigation, and Plaintiff cannot invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). Regarding the trade adjustment assistance claim, Plaintiff appears never to have filed a petition pursuant to 19 U.S.C. § 2271 (1994) and therefore there is no determination of the responsible agencies which can be reviewed by this Court under 28 U.S.C. § 1581(d) (1994).

[3] Plaintiff implicitly concedes that the only relief sought is compelling Defendants to act on his behalf, as the appropriate remedy under the APA, rather than the monetary damages also sought in the Complaint. *See* Plaintiff's Opposition at 7–8.

ican company was to operate as a *maquiladora* under Mexican law, receiving customs and other benefits, and to use this status to export the merchandise to the United States. *Id.* He states that a U.S. company, to which Plaintiff contributed substantial funds, was to supply raw materials to the Mexican company. *Id.*

Plaintiff further claims that the Mexican operations "encountered a number of serious difficulties and [were] forced to cease operations in 1991, together with the U.S. company." *Id.* at ¶ 4. Those difficulties included the Mexican government's cancellation of the company's *maquiladora* permit and legal proceedings in Mexican courts involving the company's Mexican landlord, which led to the latter's taking possession of the company's equipment and to a personal judgment against Plaintiff. Friedman Affidavit at ¶¶ 4–5. Plaintiff alleges that the government's action was improper and that the court rulings were biased against him and the company as foreign investors. *Id.*

Plaintiff claims that he sought help from the above-named U.S. agencies in connection with the company's *maquiladora* permit and the litigation in Mexican courts, which allegedly continues today. *Id.* at ¶¶ 5–6. However, according to him, little, and nothing effective, was done in response to his request, and this "failure by the responsible government agencies and officials to provide any effective assistance has prevented the business operations in Mexico from reopening." *Id.* at ¶¶ 7–9.

DISCUSSION

I

THIS ACTION IS NOT WITHIN THE SCOPE OF THE COURT'S RESIDUAL JURISDICTION

Plaintiff contends that this Court has subject matter jurisdiction under 28 U.S.C. § 1581(i).[4] The argument is premised on the assertion that Defendants' failure to help him with his business difficulties in Mexico amounted to an "embargo" or the administration and enforcement of an embargo within the meaning of section 1581(i)(3)–(4). However, the language of section 1581(i) is clear that the Court has jurisdiction only over a civil action that "arises out of any law of the United States providing for * * * [an embargo]" or the administration and enforcement of such a law. The present action does not arise out of such a law. On the contrary, Plaintiff alleges a cause of action under the APA[5] and statutes or regula-

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[4] Section 1581(i), the Court's residual jurisdiction, provides in pertinent part:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

[5] This Court has also held that the APA does not afford an independent basis for subject matter jurisdiction permitting judicial review of agency action. *Cherry Lane Fashion Group, Inc. v. United States*, 13 CIT 291, 296, 712 F. Supp. 190, 194 (1989), *aff'd*, 8 Fed. Cir. (T) 187, 897 F.2d 539 (1990).

tions defining, respectively, the functions of the Commercial Service, the USTR, and the Foreign Service. These provisions may implicate certain international trade issues, but neither of them is a law providing for an embargo or for other import regulation, as specified in section 1581(i). Thus, while section 1581(i) was "intended to give the Court of International Trade broad residual authority over civil actions arising out of federal statutes governing import transactions," *Conoco, Inc. v. Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994), it cannot confer jurisdiction in the absence of such a statute merely because the action involves issues of international trade. *See Phibro Energy, Inc. v. Franklin*, 17 CIT 383, 822 F. Supp. 759 (1993).

Plaintiff contends that the inaction of Defendant agencies completely prevented his company from importing in the United States and therefore amounted to an embargo within the meaning of *K-Mart Corp. v. Cartier*, which defined the term as "a governmentally imposed quantitative restriction—of zero—on the importation of merchandise." 485 U.S. 176, 185, 108 S.Ct. 950, 957 (1988). However, *K-Mart* addressed the issue of whether the prohibition of certain imports contained in a *U.S. law*—section 526(a) of the 1930 Tariff Act, 19 U.S.C. § 1526(a)—constituted an embargo.[6] Thus, nothing in this case supports the proposition that the failure of U.S. agencies to assist a foreign company seeking to import merchandise in the United States is somehow equivalent to a U.S. law providing for an embargo or the administration and enforcement of such a law.[7]

On the contrary, *K-Mart* stands for the proposition that section 1581(i), while intended to remedy the problem of overlapping jurisdictions between the Court of International Trade and district courts, is a relatively narrow grant of jurisdiction. The Supreme Court stated:

> Congress did not commit to the Court of International Trade's exclusive jurisdiction **every** suit against the Government challenging customs-related laws and regulations. Had Congress wished to do so it could have expressed such an intent much more clearly and simply by, for example, conveying to the specialized court "exclusive jurisdiction * * * over all civil actions against the [Government] directly affecting imports," * * * or over "all civil actions against the [Government] which arise directly from import transactions * * *."

485 U.S. at 188, 108 S. Ct. at 958 (citations omitted) (emphasis in original). Thus, in light of the statute's unambiguous language and Congress' manifest intent in rejecting different formulations of the Court's residual jurisdiction, this action clearly falls out of the purview of section 1581(i).

[6] In doing so the Court also noted that "not every governmental importation prohibition is an embargo [within the meaning 28 U.S.C. § 1581(i)]." 485 U.S. at 187, 108 S. Ct. at 958.

[7] Plaintiff also relies on *American Ass'n of Exporters and Importers-Textile and Apparel Group v. United States*, 3 Fed. Cir. (T) 58, 751 F.2d 1239 (1985) (*"AAEI-TAG"*). However, in *AAEI-TAG* the Federal Circuit decided that the Court of International Trade had jurisdiction under section 1581(i) because plaintiff objected to the "administration and enforcement of the quotas established under the authority of section 204," which is "a law providing for quantitative restrictions on textiles." 3 Fed. Cir. (T) at 64, 751 F.2d at 1244. Again, there is no law providing for an embargo or quantitative restrictions on imports on which the Court's jurisdiction could be predicated in this case.

Furthermore, courts have repeatedly held that "the terms of [the Government's] consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 770 (1941). *See also Halperin Shipping Co., Inc. v. United States*, 14 CIT 438, 443, 742 F. Supp. 1163, 1168 (1990) ("Considerations of sovereign immunity mandate that the United States only be subject to suit when the statutorily defined terms of its consent have been duly met."). Thus, the Court must adhere strictly to the language contained in section 1581(i), and cannot assume jurisdiction over this case.

II

Plaintiff Additionally Lacks Standing with Respect to Two of His Claims

An alternative ground for dismissal for lack of jurisdiction is that Plaintiff lacks standing to bring his claims under 15 U.S.C. § 4721(b) and 19 U.S.C. § 2171(c), the Commercial Service and USTR provisions. Had subject matter jurisdiction been proper under section 1581(i), Plaintiff would still have to meet the standing requirement of 28 U.S.C. § 2631(i) in order to be heard on the merits. Section 2631(i), which incorporates by reference section 10(a) of the APA, 5 U.S.C. § 702[8], provides:

> Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsection (a)–(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5.

The Supreme Court has consistently held section 702's "adversely affected or aggrieved" formulation to permit review only in cases brought by a person whose putative injuries are "'within the zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 883, 110 S.Ct. 3177, 3186 (1990). *See also Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396–400, 107 S.Ct. 750, 754–57 (1987).

The "zone of interests" test is applicable to all legislation unless it is expressly negated by Congress, and its breadth varies according to the provisions of law at issue. *Bennett v. Spear*, ____ U.S. ____, ____, 117 S.Ct. 1154, 1161–62 (1997). "[It] is a non-constitutional prudential limitation on a court's exercise of jurisdiction in contrast to the mandatory Article III requirements that a would-be litigant demonstrate that it has suffered an actual injury which can be fairly traced to the challenged action and which is likely to be redressed by a favorable decision." *Florsheim Shoe Co. v. United States*, 2 Fed. Cir. (T) 83, 87 n.4, 744 F.2d 787, 790 n.4 (1984). Thus, Plaintiff must allege facts sufficient to place him

[8] 5 U.S.C. § 702 provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

within the zone of interests protected by the statutes and regulations he relies on in order to have standing to sue.

A

PLAINTIFF IS NOT WITHIN THE ZONE OF INTERESTS PROTECTED BY 15 U.S.C. § 4721(b) AND 19 U.S.C. § 2171(c)

In this case Plaintiff has failed to show that his claim is within the zone of interests protected by 15 U.S.C. § 4721(b).[9] This provision, enacted by section 2301(b) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1338, is part of Title II of the Act, referred to as the Export Enhancement Act of 1988. Accordingly, it expresses Congress' intent to promote U.S. exports, specifically listing services that the Commercial Service should provide to U.S. exporters.

Plaintiff argues that section 4721(b) includes language to the effect that the Commercial Service's mission is not only the promotion of U.S. exports, but generally "protecting the interests of U.S. businesses abroad." Plaintiff's Reply at 3. However, all directives as to how the Commercial Service should protect U.S. business interests abroad (except paragraph (7), which does not mention aid to private business at all), refer only to "United States exporters." In particular, paragraph (6) authorizes the Commercial Service to assist United States *exporters* in their dealings with foreign governments.

The term "United States exporter" is defined by the statute as an entity (including a U.S.-owned foreign corporation) "that exports, or seeks to export, goods or services produced in the United States." 15 U.S.C. § 4721(j)(3). In contrast, Plaintiff declares that his "business, if operational, would be engaged in production of goods for importation into the United States." Plaintiff's Opposition at 4. Thus, Plaintiff, as a potential importer to the United States, is clearly not within the zone of interests protected by section 4721(b).

Plaintiff modified his claim in response to Defendants' contention that he is not within the zone of interest protected by the Export Enhancement Act. He argues that even if this zone is limited to U.S. exporters, it still covers his injury, because the Mexican company was to be supplied with raw materials exported by Mr. Friedman's U.S. company. Plaintiff's Reply at 3. However, the argument is without merit because Plaintiff has never alleged that he sought assistance from Defendant agencies for the U.S. company, which potentially qualifies as an exporter under the statute, but only for the Mexican company, which Plaintiff himself describes as an importer. In sum, only U.S. exporters fall within the zone of interests protected by section 4721(b), and Plaintiff lacks

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[9] 15 U.S.C. § 4721(b), as amended, provides in relevant part:

> The Commercial Service shall place primary emphasis on the promotion of exports of goods and services from the United States, particularly by small businesses and medium-sized businesses, and on the protection of United States business interests abroad by carrying out activities such as—
>
> * * * * * * * *
>
> (6) assisting United State exporters in their dealings with foreign governments and enterprises owned by foreign governments * * *.

standing for his claim that he was denied assistance in violation of this provision.

Plaintiff has similarly failed to establish that he was "adversely affected or aggrieved" within the meaning of 19 U.S.C. § 2171(c)(1)(A). Section 2171(c)(1)(A), added by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, Title I, § 1601, 102 Stat. 1260, gives the United States Trade Representative "the primary responsibility for developing, and for coordinating the implementation of, United States international trade policy * * *." This broad grant of authority cannot be construed as intended for the protection of private parties, much less as imposing a duty on the USTR to act on behalf of persons engaged in importing into the United States.

In brief, the interests asserted in Plaintiff's claims under 19 U.S.C. § 2171(c) and 15 U.S.C. § 4721(b) are "so marginally related to or inconsistent with the purposes implicit in the statute[s] that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757. Thus, in addition to lacking subject matter jurisdiction, the Court cannot entertain jurisdiction over these claims because Plaintiff lacks standing to present them.

B

PLAINTIFF HAS STANDING FOR HIS CLAIM UNDER 22 C.F. R. §§ 101.1 AND 101.3

With respect to his claim that FSOs refused to help him in violation of 22 C.F.R. §§ 101.1 and 101.3,[10] Plaintiff has alleged sufficient facts to meet section 2631(i)'s prudential standing requirement. The zone of interests protected by these regulations, and specifically section 101.3(b), appears to encompass Plaintiff as an American citizen involved in foreign trade. In arguing that Plaintiff lacks standing, Defendants fail to deal with the Foreign Service regulations claim, apparently because section 702 of the APA speaks of "adversely affected or aggrieved by agency action within the meaning of a relevant *statute*." *See* Defendants' Reply at 8–10. Since regulations are necessarily promulgated under the authority of a statute, in this case the Foreign Service Act of 1946[11], Plain-

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[10] Section 101.1 provides in relevant part:

> Officers of the Foreign Service shall protect the rights and interests of the United States in its international agricultural, commercial, and financial relations. In pursuance of this duty, they shall:
>
> (a) Guard against the infringement of rights of American citizens in matters relating to commerce and navigation which are based on custom, international law, or treaty.

Section 101.3 provides in relevant part:

> Officers of the Foreign Service shall perform the following-enumerated services for American citizens and business organizations in connection with the conduct of foreign trade * * *
>
> * * * * * * * *
>
> (b) Lending direct assistance to American citizens and business firms.

[11] Sections 101.1 and 101.3, part of Subchapter K, "Economic, Commercial and Civil Aviation Functions," of the Foreign Service regulations were promulgated under authority of section 302 of the Foreign Service Act of 1946, 60 Stat. 1001–1002, codified as 22 U.S.C. § 842. The Act was repealed by the Foreign Service Act of 1980, Pub. L. No. 96–465, § 2205(1), 94 Stat. 2159, as part of a general revision of the laws relating to the administration of the Foreign Service. However, a savings provision, section 2401, 94 Stat. 2168, codified as 22 U.S.C. § 4172, provides *inter alia* that all regulations issued under authority of the Foreign Service Act of 1946 "shall continue in full force and effect until modified, revoked, or superseded by appropriate authority."

tiff could be "adversely affected or aggrieved" within its meaning.[12] However, even if Plaintiff had satisfied the standing requirement, this Court would still not possess jurisdiction over claims arising out of the Foreign Service Act or regulations promulgated under its authority.

III

Transfer of the Case to a Federal District Court Is Not Appropriate

Plaintiff requests that if this Court lacks jurisdiction, it should transfer the case to the U.S. District Court for the Eastern District of New York. Plaintiff's Opposition at 6. 28 U.S.C. § 1631 (1994) provides that "[w]henever a * * * [federal] court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action * * * to any other such court in which the action * * * could have been brought at the time it was filed * * *."[13]

If this action were brought in the district court under the APA, the six-year limitation period of 28 U.S.C. § 2401(a) (1994) would apply. Plaintiff alleges that he requested and was denied assistance by Defendant agencies some time in 1991 when the Mexican company went out of business. *See* Friedman Affidavit at ¶¶ 4–8. Thus, depending on when the above events took place, the six-year limitation period may have expired between May 8, 1996, when this action was commenced, and the present time.[14] If this is the case, dismissal will deprive Plaintiff of forum, and, absent other considerations, transfer might be in the interest of justice.

However, transfer is not warranted under section 1631 if the district court would also lack jurisdiction over an action. As shown above, Plaintiff lacks standing under section 702 of the APA with respect to two of his claims. Therefore the bar of non-justiciability will prevent any federal court from assuming jurisdiction over these claims. The Supreme Court has held that section 1631 "confers on [a federal court] authority to make a single decision upon concluding that it lacks jurisdiction—whether to dismiss the case or 'in the interest of justice,' to transfer it to a [court] that has jurisdiction." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818, 108 S.Ct. 2166, 2179 (1988). Accordingly, the statute would not authorize transfer to a court that would similarly lack jurisdiction. As the Ninth Circuit held, "transfer is improper where the transferee court lacks jurisdiction and thus could not have originally heard the suit." *Clark v. Busey*, 959 F.2d 808, 812 (9th Cir. 1992). *See also Charles v. Rice*, 28 F.3d 1312, 1322 (1st Cir. 1994); *Ear-*

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[12] *See, e.g., Capital Legal Found. v. Commodity Credit Corp.*, 711 F.2d 253, 258–59 (D.C. Cir. 1983) (the court dealt with an APA claim that an agency had violated applicable regulations, stating that "the 'zone' test is passed if a plaintiff's interest in the agency action appears to fall within the ambit of the constitutional clause, statute or *regulation* allegedly violated."); *Webster v. Doe*, 486 U.S. 592, 602 n.7, 108 S.Ct. 2047, 2053 n.7 (1988) (citing authority for the proposition that an agency's failure to follow its own regulations can be challenged under the APA as a violation of the relevant statute).

[13] Circuit courts have held that a court must, upon finding that it lack jurisdiction, consider if transfer of the action to a court that has jurisdiction would be "in the interest of justice," even if the parties have not raised the issue. *See Hays v. Postmaster General*, 868 F.2d 328, 331 (9th Cir. 1989); *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 81 (D.C. Cir. 1985).

[14] This also raises a question whether Plaintiff's claim would have been barred by 28 U.S.C. § 2636(i), which provides that any cause of action brought under 28 U.S.C. § 1581(i) must be brought within two years of the date that the cause of action accrues.

nest v. United States, 33 Fed. Cl. 341, 344 (1995). Therefore, Plaintiff's claims under 19 U.S.C. § 2171(c) and 15 U.S.C. § 4721(b) are not transferable and must be dismissed.

With respect to Plaintiff's claim under 22 C.F.R. §§ 101.1 and 101.3, transfer would not be in the interest of justice. While the District Court may arguably possess jurisdiction over this claim, actions of the FSOs under the regulations in question appear to be unreviewable[15], in which case Plaintiff is not entitled to relief. The Federal Circuit has held that transfer of a case where the petitioner has failed to make a *prima facie* showing of a right to relief would not be in the interest of justice. *Ferris v. Dep't of the Navy*, 810 F.2d 1121, 1123 (Fed. Cir. 1987).

In *Campbell v. Office of Personnel Management*, the Third Circuit held that transfer would not be in the interest of justice because no court would have had the power to review the challenged determination, and because, even if the determination had been reviewable, the petitioner could not have prevailed on the facts presented. 694 F.2d 305, 309 n.6 (3d Cir. 1982). Thus, transfer "should not take place if the action most probably would be dismissed in the District Court. The court should not countenance the performance of a futile act if it only produces a drain on party and judicial economy and time." *Singleton v. United States*, 6 Cl. Ct. 156, 168 (1984).

Judicial review is precluded by section 10 of the APA, 5 U.S.C. § 701(a)(2), in cases where "agency action is committed to agency discretion by law." The Supreme Court has held that agency action is unreviewable under section 701(a)(2) "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655 (1985). In this case, the relevant statute, 22 U.S.C. § 842, merely authorizes the Secretary of State to prescribe regulations regarding the duties, functions and obligations of FSOs. The regulations themselves do not provide any standards as to the circumstances and manner in which FSOs should assist American citizens abroad. Consequently, there are no judicially manageable standards against which to judge the agency's alleged refusal to assist Mr. Friedman.[16]

In addition, the Foreign Service is the country's professional diplomatic corps, declared by statute to be "essential in the national interest to assist the President and the Secretary of State in conducting the foreign affairs of the United States." 22 U.S.C. § 3901(1). Thus, the duties of the Foreign Service involve a foreign affairs function of the Executive Branch, which has been traditionally shielded from judicial review. *See,*

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[15] As stated by the Supreme Court, the APA's judicial review provisions are not "jurisdictional," but rather raise a question of "[w]hether a cause of action exists." *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 523, n.3, 111 S.Ct. 913, 917 n.3 (1991).

[16] In *Local 2855, AFGE v. United States*, the Third Circuit stated that "[t]he existence of broad discretionary power in an agency often suggests that the challenged decision is a product of political, military, economic or managerial choices that are not really susceptible to judicial review." 602 F.2d 574, 579 (3rd Cir. 1979). The Court found agency action unreviewable since the statutory scheme similarly gave broad authority to the head of the agency to prescribe regulations and the regulations likewise failed to provide any meaningful criteria against which to judge the agency's exercise of discretion. *Id.* at 580–82.

e.g., Jensen v. Nat'l Marine Fisheries Serv., 512 F.2d 1189, 1191 (9th Cir. 1975):

In brief, the challenged refusal of the Foreign Service to assist Plaintiff is unreviewable under the APA. Transfer of Plaintiff's Foreign Service regulations claim would therefore be futile and is denied.

CONCLUSION

For the foregoing reasons, Defendant's Motion is granted, and the case is dismissed in whole for lack of jurisdiction. Transfer to a federal district court is denied.

(Slip Op. 97–113)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS CO., GLOBE METALLURGICAL, INC., AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COMPANHIA FERROLIGAS MINAS GERAIS, DEFENDANT-INTERVENOR

Consolidated Court No. 97–02–00267

(Dated August 18, 1997)

ORDER

MUSGRAVE, *Judge:* Upon consideration of defendant's consent motion for leave to consider ministerial error allegations and correct ministerial errors identified, it is hereby

ORDERED that defendant's motion is granted; and it is further

ORDERED that the Department of Commerce ("Commerce") is directed to consider the following alleged ministerial errors and correct ministerial errors identified in the allegations and contained in *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 1970 (Jan. 14, 1997); and it is further

ORDERED that Commerce shall correct any ministerial errors identified and publish Amended final Results, incorporating any such corrections, in the Federal Register within sixty (60) days following entry of this order; and it is further

ORDERED that other proceedings in this case are stayed pending publication of the Amended Final Results.

(Slip Op. 97–114)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS CO., GLOBE METALLURGICAL, INC., AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND CAMARGO CORREA METAIS, S.A., AND COMPANHIA FERROLIGAS MINAS GERAIS-MINASLIGAS, DEFENDANTS-INTERVENORS

Court No. 97–02–00268

(Dated August 18, 1997)

ORDER

MUSGRAVE, *Judge:* Upon consideration of defendant's unopposed motion for leave to consider ministerial error allegations and correct ministerial errors identified, it is hereby

ORDERED that defendant's motion is granted; and it is further

ORDERED that the Department of Commerce ("Commerce") is directed to consider the following alleged ministerial errors and correct ministerial errors identified in the allegations and contained in *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 1954 (Jan. 14, 1997); and it is further

ORDERED that Commerce shall correct any ministerial errors identified and publish Amended final Results, incorporating any such corrections, in the *Federal Register* within sixty (60) days following entry of this order; and it is further

ORDERED that other proceedings in this case are stayed pending publication of the Amended Final Results.

(Slip Op. 97–115)

KEMET ELECTRONICS CORP., VISHAY INTERTECHNOLOGY, INC., CORNELL DUBILIER, INC., AEROVOX CORP., AND BARKER MICROFARAD, INC., COLLECTIVELY, PASSIVE ELECTRONICS COALITION, PLAINTIFFS *v.* CHARLENE BARSHEFSKY, UNITED STATES TRADE REPRESENTATIVE, AND GEORGE WEISE, COMMISSIONER OF CUSTOMS, DEFENDANTS

Court No. 97–06–00930

[Preliminary injunction denied and motion to dismiss denied in part and granted in part.]

(Dated August 19, 1997)

Porter, Wright, Morris & Arthur (Richard M. Markus, David C. Tryon, Leslie A. Glick and *Bart Fisher)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeffrey M. Telep), Susan G. Esserman*, General Counsel, and *Hal Shapiro*, Assistant General Counsel, Office of the United States Trade Representative, and *Ellen Daly*, Office of the Chief Counsel, United States Customs Service, of counsel, for defendants.

Democratic Trade Counsel (Gregg Elias) for Senator Ernest F. Hollings, *amici curiae.*

Dewey Ballantine (Alan Wm. Wolff, Michael H. Stein, and *Elizabeth A.B. McMorrow)* for Semiconductor Industry Association, *amici curiae.*

Wilmer, Cutler & Pickering (John Greenwald) for Information Technology Industry Council, *amici curiae.*

OPINION

RESTANI, *Judge:* Plaintiffs Kemet Electronics Corp., *et al.* (collectively, "the Passive Electronics Coalition"), seek a preliminary injunction against defendants, United States Trade Representative Charlene Barshefsky ("USTR") and Commissioner of Customs George Weise, to enjoin the reduction and eventual elimination of tariffs on capacitors and resistors as part of the Information Technology Agreement ("Agreement") negotiated by the USTR under the auspices of the World Trade Organization ("WTO"). Plaintiffs contend that the authority to proclaim tariff reductions delegated by Congress to the President under the Uruguay Round Agreements Act ("URAA") is unconstitutionally broad or, alternatively, that the President exceeded his delegated authority when he proclaimed the staged elimination of tariffs on capacitors and resistors. Defendants move to dismiss the complaint pursuant to USCIT Rule 12(b)(1) and (5), claiming that this court lacks subject matter jurisdiction and plaintiffs fail to state a claim upon which relief can be granted.

BACKGROUND

Capacitors and resistors are passive electronic components that perform integral functions in the operations of most electrical systems, including computers, communication devices, consumer electronics, automobiles, and industrial equipment. *See* International Trade Comm'n, *Advice Concerning the Proposed Modification of Duties on*

Certain Information Technology Products and Distilled Spirits, Pub. No. 3031 at 5–30 (Apr. 1997) (report to President) [hereinafter "*ITC Report*"]. Capacitors and resistors have many uses due to their electrical characteristics and are used frequently in concert with semiconductors to construct a functional circuit on a printed circuit board. *Id.* They are largely produced and consumed in those countries that produce electronic systems—the United States, the European Union, Japan, and various other Asian countries. *Id.*

During the Uruguay Round of multilateral trade negotiations, the United States negotiated a series of reciprocal agreements to reduce tariff and non-tariff barriers to trade. The results of the Uruguay Round were implemented in two ways. Tariff reductions that were within the limits of the proclamation authority that had been delegated to the President by the Congress under 19 U.S.C. § 2902(a)(2)(A) (1994) were implemented by proclamation without further Congressional action. Agreements to reduce tariffs beyond the limits in the President's proclamation authority, and non-tariff barrier agreements, were implemented by "fast track" legislation under 19 U.S.C. § 2903 (1994). "Fast track" implementation of Uruguay Round tariff rate reductions that exceeded the duty reductions which the President was authorized to proclaim is expressly provided for by 19 U.S.C. § 2902(a)(6) (1994).

Recognizing the interest of the United States in concluding negotiations that were not completed at the time the Uruguay Round ended, Congress delegated to the President authority under Section 111(b) of the URAA (codified as 19 U.S.C. § 3521(b)) to proclaim the elimination of tariffs if their elimination is provided for by "multilateral negotiation under the auspices of the WTO" and the tariff elimination applied to "the rate of duty on an article contained in a tariff category that was the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round of multilateral trade negotiations." 19 U.S.C. §§ 3521(b)(1)(A),(B) (1994); *see also* 108 Stat. 4819, 4819–20 (1994). The proclamation authority of Section 111(b) was, in another respect, broader and, in one respect, narrower than the tariff proclamation authority that had been delegated to the President under 19 U.S.C. § 2902(a)(2)(A) for purposes of implementing the results of the Uruguay Round. Section 111(b) eliminated the restrictions on the degree of tariff modifications that could be proclaimed, but further restricted the articles for which tariff rate changes could be proclaimed.[1] 19 U.S.C. § 3521; 108 Stat. at 4819–20.

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[1] Section 2902, Title 19 of the United States Code authorized "the President to enter into trade agreements with foreign countries and to proclaim modifications in U.S. rates of duty necessary or appropriate to carry out such agreements," subject to some limitations, including that duty reductions cannot exceed 50 percent, except that duties of 5 percent *ad valorem* or below may be reduced to zero. *See* H.R. Rep. No. 103–826(7), at 27 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3799. "Section 111(b) [of the URAA] provides the President proclamation authority to complete 'zero-for-zero' tariff elimination, as well as accelerated staging of rate reductions and rate harmonization in those sectors where these U.S. objectives could not be achieved in the Uruguay Round negotiations." *Id.* at 3800–01. Section 111(b) limited the President's proclamation authority to "the modification of any duty or staged rate reduction set forth in Schedule XX if the United States agrees to the modification or reduction in a WTO multilateral negotiation and it applies to the duty on an article in a tariff category that was the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round." *Id.* at 3799–3800.

At the first Ministerial Conference of the World Trade Organization in December 1996, the United States and 27 other countries concluded negotiation of the *Ministerial Declaration on Trade in Information Technology Products* (commonly referred to as the "Information Technology Agreement"), which provides for "zero-for-zero" tariff rate concessions on over $500 billion in annual global trade in electronic products. *Ministerial Declaration on Trade in Information Technology Products*, Dec. 13, 1996, 36 I.L.M. 375, 383 (1997) [hereinafter "Agreement"]; *see also* Renato Ruggiero, Statement Issued to WTO Information and Media Relations Division, Press Release No. 69 at 1 (Mar. 3, 1997); Defs.' Attachment O. As part of its commitments under the Agreement, the United States agreed to the staged elimination of tariffs on capacitors and resistors over a four year period. *See Agreement*, 36 I.L.M. at 385.

Prior to the Presidential Proclamation challenged herein, there was a 9.4% *ad valorem* tariff on the importation of capacitors under Item No. 8532 of the Harmonized Tariff Schedule of the United States, USITC Pub. 3001, Sec. XVI, ch. 85, at 49 (1997) [hereinafter "HTSUS"].[2] HTSUS Item No. 8533 imposed a 6% *ad valorem* tariff on the importation of resistors.[3] *Id.* at 50. The USTR announced on December 13, 1996 that the United States would reduce these tariffs by 25% each year starting on July 1, 1997 and would completely eliminate such tariffs by January 1, 2000. *See Agreement*, 36 I.L.M. at 385, 388. The Agreement came into effect by Presidential Proclamation, dated June 30, 1997. Proclamation No. 7011, 62 Fed. Reg. 35,909 (1997).

Plaintiffs own and operate manufacturing facilities in the United States for the production and sale of electronic capacitors and resistors. Plaintiffs seek to enjoin the reduction of the tariffs on capacitors and resistors. Defendants filed a motion to dismiss.

DISCUSSION

I. *Preliminary Injunction:*

In determining whether to grant a preliminary injunction, the court must balance four factors: 1) the threat of immediate, irreparable harm to plaintiffs; 2) the likelihood of success on the merits; 3) whether the public interest would be better served by issuance of a preliminary injunction; and 4) whether the balance of hardships favors plaintiffs. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983).

At the outset, the defendants argue that plaintiffs are not entitled to injunctive relief due to their delay in bringing this action. The defendants claim that the fact that plaintiffs waited six months after they believed their cause of action accrued before filing their complaint refutes their claim for injunctive relief. *See, e.g., High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1557 (Fed. Cir. 1995)

[2] In the HTSUS, heading 8532 has nine 8–digit subheadings. Except for the one subheading covering parts of capacitors, all others were subject to the 9.4% *ad valorem* tariff. *See id.*

[3] Depending on the subheading, the MFN tariff rate for resistors was alternatively 5.3%, 4.2% or zero ad valorem. *Id.* at 50–51

(finding 17-month delay militated against issuance of preliminary injunction in patent infringement case); *T.J. Smith & Nephew Ltd. v. Consolidated Med. Equip., Inc.*, 821 F.2d 646, 648 (Fed. Cir. 1987) (15-month delay plus grant of licenses by patentee sufficient to overcome presumption of irreparable harm). As plaintiffs knew that capacitors and resistors were included in the Agreement as early as December 13, 1996, and yet did not file their complaint until June 2, 1997, the defendants contend that this fact alone constitutes a basis for denying plaintiffs' request for a preliminary injunction.

Plaintiffs claim that they were seeking non-judicial remedies, such as meeting with the USTR and her staff, during the six month period between their discovery that capacitors and resistors were included within the Agreement and the filing of their complaint. *See* Compl. ¶ 9, at 3. As this six-month delay did not prejudice defendants, the court finds that plaintiffs' delay in filing their complaint, by itself, does not constitute a sufficient basis for denying plaintiffs injunctive relief.

A. *The Threat of Immediate, Irreparable Harm:*

To prevail on a motion for preliminary injunction, plaintiffs have the burden of producing "probative evidence" to demonstrate a threat of immediate, irreparable harm. *National Hand Tool Corp. v. United States*, 14 CIT 61, 66 (1990).

> Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined. A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great. A presently existing, actual threat must be shown.

S.J. Stile Assocs. Ltd. v. Snyder, 646 F.2d 522, 525 (C.C.P.A. 1981) (citations omitted).

Plaintiffs claim that a 25% reduction in the current tariffs on capacitors and resistors will dramatically harm U.S. manufacturers by allowing foreign manufacturers to export their products to the United States without paying the current duties. Plaintiffs assert that capacitors and resistors are generally produced in very high volumes in order optimally to reduce price as competition for sales is highly price-sensitive. *See ITC Report* at 5–30, 5–36. As a result, plaintiffs state that many producers have become highly specialized and produce only a limited number of types of capacitors or resistors. *See id.* at 5–33 to 5–34. Plaintiffs also assert that domestic producers have high labor costs relative to many foreign producers of electronic components and thus face a relative disadvantage in production costs. *See id.* at 5–37. Plaintiffs claim that the U.S. capacitor and resistor manufacturing industry is attempting to compensate for its increased labor costs with automation and production sharing, but that it cannot completely offset higher labor costs. *See id.*

As sales of these products are extremely price sensitive, plaintiffs assert that a 25% duty reduction will have disastrous consequences for

them, but admit that they cannot determine the precise impact on their sales and profits. Plaintiffs claim that this difficulty in quantifying damages from lost business further supports injunctive relief. As specific examples, plaintiffs have provided testimony and affidavits stating the following:

> a. Kemet Electronics Corp. estimates that the results of the tariff reductions for the fiscal year 1997 would be a $13,000,000 loss in revenue and pre-tax profit and a $8,900,000 loss (a 23% reduction) in net income. *See* Poinsette Aff. ¶ 16, at 5 & Ex. 1, at 2; Pls.' Mot. for TRO, Ex. C.
>
> b. Barker Microfarad, Inc., a producer of aluminum capacitors, estimates that in the first year after the initial tariff reduction it will lose approximately $1,171,000 in annual sales (approx. 10% of present sales) with the related loss of 25 (out of 250) jobs. *See* Poole Aff. ¶ 7(a) at 2; Pls.' Mot. for TRO, Ex. A.
>
> c. Cornell Dublier Electronics estimates that the phase-out of the tariffs will cause a $570,000 loss in 1998 sales and profit losses of $86,000. *See* Kaplan Aff. ¶ 7, at 2; Pls.' Mot. for TRO, Ex. B.
>
> d. Vishay Intertechnology, a resistor manufacturer, predicts that as a result of the tariff reduction and eventual elimination it will experience pressure from foreign competitors and will be forced to cut labor costs by transferring jobs from the U.S. to a low labor cost country. *See* Eden Test., Hr'g Tr. at 55–56 (July 10, 1997).

Plaintiffs claim that they will each suffer damage similar to these examples as a result of the tariff reductions.

Furthermore, plaintiffs contend that the tariff reductions will greatly exacerbate inroads that foreign capacitor and resistor manufacturers have made in the U.S. market in recent years. Plaintiffs claim that the number of U.S. owned and operated manufacturers of these products has been shrinking steadily and the proposed tariff elimination will provide further advantage for foreign manufacturers who seek to control the U.S. market. *See, e.g.*, *ITC Report*, at Ex. F–2 to F–9 (letters from domestic manufacturers of resistors and capacitors); Pls.' Br. in Support of Mot. for TRO at 7. Plaintiffs maintain that they have faced a continuing erosion of their market share in favor of Japanese manufacturers who they claim garner U.S. market share by charging less than market prices here while their government permits Japanese markets to be closed to foreign competition, preventing plaintiffs from selling there.

Plaintiffs further assert that once jobs and related skills are lost in the United States, regaining them in the future will be extremely difficult. Plaintiffs argue that the jobs that move overseas are inevitably accompanied by the technology for manufacturing these products and within a few years after those countries gain these jobs, they will develop the necessary engineering and training skills to fully support the manufacture of capacitors and resistors. Even if the United States were later able to become sufficiently price competitive to bring the manufacturing jobs back, plaintiffs claim that manufacturers would have to start from

scratch in rebuilding the industry. Plaintiffs maintain that these losses will be permanent and irreparable.

Moreover, plaintiffs argue that if the tariff reductions go forward, but are ultimately held invalid, they will have no recourse against anyone for their lost sales and profits. They also assert that any workers who have lost their jobs as a result of lost sales will likewise have no recourse. Plaintiffs contend that irreparable harm from lost business supports immediate injunctive relief. *Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995)(noting that courts have found irreparable harm where party threatened with the loss of a business).

Despite plaintiffs' contentions of the general harm they will suffer as a result of the 25% tariff reduction, the court finds that plaintiffs have failed to produce sufficiently probative evidence to demonstrate the threat of actual, immediate, irreparable harm, rather than simply prospective harm. *See National Hand Tool Corp.*, 14 CIT at 66. Plaintiffs assume that a reduction in the tariffs on capacitors and resistors will necessarily result in a reduction in import prices by an equal amount, but present weak evidence to support this assumption. Moreover, plaintiffs do not take into account the possibility that if capacitor or resistor prices are in fact lowered, there may be some increase in demand that may offset the impact of lower prices. As the ITC Report indicates, demand for capacitors and resistors is closely related to the sales of various kinds of electronic components in which they are utilized. *See ITC Report* at 5–39 to 5–40. The trend in the U.S. market for capacitors and resistors over the last four years has been one of growth, from $2.1 billion in 1992 to $2.4 billion in 1996. *Id.* at 5–40. Plaintiffs have presented no compelling evidence to contradict evidence of this trend given the ITC's prediction that the Agreement's duty elimination "is likely to result in increased market access opportunities." *See id.* Furthermore, plaintiffs ignore the fact that the Agreement will reduce tariffs on capacitors and resistors in export markets such as Taiwan, Malaysia, Korea, Canada, the European Union, India, Australia, Singapore, New Zealand, and Turkey. *See id.* at 5–40 to 5–43 *(e.g.*, without the Agreement, imports would be dutiable at rates ranging from 40% in India and Indonesia, 13% in Korea, and 10% in Singapore). Accordingly, the court finds that although plaintiffs have made a showing of some *prospective* harm, plaintiffs have failed to demonstrate serious *actual* harm which cannot be undone before the merits of the case are determined.

In discussing the four factors the court analyzes to determine whether injunctive relief should be granted, the Federal Circuit has stated that,

> No one factor, taken individually, is necessarily dispositive. If a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of the others. If the injunction is denied, the absence of an adequate

> showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify the denial.

FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993). Although plaintiffs' weak showing of the threat of immediate, irreparable harm may be dispositive, the court will consider the remaining factors.

B. *Likelihood of Success on the Merits:*

In *Kemet Electronics Corp. v. United States*, Slip Op. 97–84, No. 97–06–00930, 1997 WL 36942 (Ct. Int'l Trade June 27, 1997), the court determined that plaintiffs were unlikely to prevail on their argument that Congress' delegation of law-making power to the President was unconstitutional because Congress had imposed no time limit in the URAA on presidential tariff-reducing authority and because the other purported limitations on such authority are so expansive. *Id.* at 7–8, 1997 WL 369642, at *3. As plaintiffs have not presented new arguments which would cause the court to reconsider this conclusion, the court finds that plaintiffs remain unlikely to succeed based on this argument. Similarly, plaintiffs do not present new arguments which alter the court's view that the statutory consultation and layover requirements of 19 U.S.C. § 2155 and 19 U.S.C. § 3524 were met. *See id.* at 8–13, 1997 WL 369642, at *4–6.

As to whether the USTR acted within the President's authority to proclaim the proposed tariff reductions, plaintiffs argue that because the government has exclusive control over any evidence of its "secret" communications with its negotiating partners or foreign nations the government shoulders the burden of proving that it conducted "reciprocal duty elimination * * * negotiations" for capacitors and resistors pursuant to 19 U.S.C. § 3521(b)(1)(B) (1994).[4] *See Williams v. Administrator of NASA*, 463 F.2d 1391, 1400 (C.C.P.A. 1972) ("[W]here a party is in a position to have peculiar knowledge of the facts with regard to an issue, the burden of proof as to that issue lies upon that party.") (citing McCormick, *Evidence*, § 337 (2d ed. 1972)).

Section 111(b) of the URAA (codified as 19 U.S.C. § 3521(b)) authorizes the President to modify duties on articles in tariff categories that were the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round of multilateral trade negotiations. Plaintiffs assert that capacitors and resistors, however, were not contained within the list of "zero-for-zero" tariff elimination initiatives proposed by the USTR during these negotiations. In connection with the denial of plaintiffs' motion for a temporary restraining order, the court concluded that documents presented by defendants, including the

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[4] Section 3521(b)(1)(B) provides,

> (b) Other tariff modifications
>
> Subject to the consultation and layover requirements of section 3524 of this title, the President may proclaim—
>
> (1) the modification of any duty or staged rate reduction of any duty set forth in Schedule XX if—
>
> * * * * * * * * *
>
> (B) such modification or staged rate reduction applies to the rate of duty on an article contained in a tariff category that was the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round of multilateral trade negotiations.

19 U.S.C. § 3521(b)(1)(B).

March 15, 1990 *U.S. Proposal for Uruguay Round Market Access Negotiations*[5] (hereinafter *"U.S. Proposal")* and correspondence from the government of Canada,[6] supported the conclusion that the "tariff category" at issue was the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round of multilateral trade negotiations. *Kemet Elecs. Corp.*, Slip Op. 97–84, at 16, 1997 WL 369642, at *7. Defendants, however, did not present any witnesses or further evidence to support this conclusion at the preliminary injunction hearing. Under these circumstances, plaintiffs argue that the court can and should infer that defendants cannot support this contention for which they have the burden of proof.

The *U.S. Proposal* does support defendants' position, although not conclusively so, and plaintiffs have not presented evidence to contradict the inferences defendants draw from the proposal. Accordingly, the court finds that, thus far, plaintiffs appear unlikely to succeed on the merits of their claim that capacitors and resistors were not included in a tariff category that was the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round of multilateral trade negotiations.

C. *The Public Interest:*

Plaintiffs have provided no further argument or evidence to contradict the court's initial conclusion that the public interest favors denying plaintiffs' motion for injunctive relief given the important foreign relations concerns of the United States and the potential harm to the Agreement as a whole. *See Kemet Elecs. Corp.*, Slip Op. 97–84, at 16–18, 1997 WL 369642, at *7–8. This factor favors delaying any relief until this matter is finally concluded.

D. *Balance of Hardships:*

Plaintiffs claim that defendants rely entirely on assertion and argument to support their claim that the government suffers the balance of hardships. Plaintiffs assert that defendants have exclusive control over any evidence of what effect a preliminary injunction regarding U.S. tariffs on capacitors and resistors would have on any other nation's tariffs for capacitors and resistors or for any other nation's participation in the Agreement as a whole. To support its contentions of hardship in connection with the motion for a temporary restraining order, defendants submitted the declaration of Ambassador Jeffrey Lang, the Deputy USTR, which provides Lang's assessment of the hardships the United States, the other parties to the Agreement, and the Agreement as a whole would face if injunctive relief is granted. Decl. of Lang, at 1–3. Although defendants did not offer Ambassador Lang as a witness at the preliminary injunction hearing, the court notes that plaintiffs did not seek to depose

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[5] The *U.S. Proposal* also makes clear that during the Uruguay Round the USTR intended to "explore duty-free sectoral approaches as part of the overall market access negotiations," even where proclamation authority was lacking. *See U.S. Proposal*; Defs.' Attach. D. This included parts of the electronics sector. *Id.* at 5. Chapter 85 of the HTSUS, which includes the tariff categories at issue is listed as available for negotiation on reciprocal duty eliminations. *Id.*

[6] Plaintiffs challenge the admissibility of this document. The court does not reach this issue, as the otherwise admissible evidence supports defendants' view.

him prior to the hearing or to delay the hearing for this purpose, nor did they produce evidence which contradicts the governmental concerns expressed by the ambassador. Plaintiffs were aware that defendants did not plan to present any witnesses at least two days prior to the hearing. Under these circumstances it appears appropriate to consider the matters asserted in the declaration. The court finds that Lang's declaration and the lack of any evidence contradicting it provides adequate support for defendants' claim that the balance of hardships favors denying injunctive relief. Plaintiffs' weak evidence of immediate harm is outweighed by the harm which would likely result from reneging on an international commitment. Consequently, the court denies plaintiffs' motion for a preliminary injunction.

II. *Motion to Dismiss:*

Defendants move to dismiss the complaint, arguing that the Presidential Proclamation implementing the Agreement is not subject to judicial review, plaintiffs lack standing, and plaintiffs have failed to state a claim upon which relief can be granted.

A. *Judicial Review:*

Plaintiffs allege that "defendants' actions in causing or permitting those purported tariff reductions or eliminations adversely affect or aggrieve these plaintiffs within the meaning of 28 U.S.C. § 2631(i)." Compl. ¶ 11, at 3. Section 2631(i) defines standing for purposes of an action under 28 U.S.C. § 1581(i) by reference to Administrative Procedures Act ("APA"), 5 U.S.C. § 702. Section 2631(i), Title 28 of the United States Code provides,

> Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)–(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5.

28 U.S.C. § 2631(i) (1994). Section 702, Title 5 of the United States Code provides in relevant part that,

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages or stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (1994). Section 704 of the APA in relevant part, however, permits judicial review only of final agency actions. *Id.* § 704 (1994).

Defendants argue that judicial review of plaintiffs' claims is unavailable as courts have uniformly held that when Congress grants the President the final authority to act pursuant to a statutory mandate,

subordinate actions and recommendations by an executive branch agency do not constitute final agency action within the meaning of the APA. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788 (1992). In *Franklin*, plaintiffs challenged the methodology by which overseas federal employees were allocated to states in the 1990 census, which, in turn, impacted how seats in the House of Representatives would be reapportioned. *Id.* at 790–91. Under the applicable statute, the Secretary of Commerce is required to perform the census and report the results to the President, who within nine months is required to submit a statement to Congress indicating the number of Representatives to which each state is entitled based on the census data. *Id.* at 792. The plaintiffs sued the President, the Secretary of Commerce, a Census Bureau official, and other officials seeking injunctive and declaratory relief. *Id.* at 790.

In deciding whether judicial review under the APA was available, the Supreme Court looked to whether the "final" action that plaintiffs challenged was that of an "agency." *Id.* at 796. In making this determination, the Court stated that it has looked to, among other things, "whether its impact 'is sufficiently direct and immediate' and has a 'direct effect on * * * day-to-day business.'" *Id.* at 796–97 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). The Court further stated that, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.* at 797. The Supreme Court held that APA review of the Secretary of Commerce's census findings was unavailable because the report by the Secretary was not a final agency action and the action challenged was that of the President, who is not an agency under the meaning of the APA. *See id.* at 800–01. Although the Court left open the question whether the President might be subject to judicial injunction requiring the performance of a purely "ministerial" duty, the Court concluded that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Id.* at 802–03 (quoting *Mississippi v. Johnson*, 71 U.S. 475 (1867)).

In the subsequent case of *Dalton v. Specter*, 511 U.S. 462 (1994), the Supreme Court held that the recommendations submitted by the Secretary of Defense and the Defense Base Closure and Realignment Commission to the President were not subject to judicial review under the APA as the recommendations did not constitute final agency action. *Id.* at 476–77. The Court held that the action that "will directly affect" the military bases is taken by the President when he submits his certificate of approval of the recommendation to Congress. *Id.* at 469 (quoting *Franklin*, 505 U.S. at 797). As the Court determined in *Franklin* that the President is not an "agency" for purposes of the APA, review of the President's action with regard to this base closing under the APA was not available. *Id.* at 470.

Finally, defendants cite to the District of Columbia Circuit's opinion in *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C.

Cir. 1993), as support for the proposition that the USTR's actions in negotiating the Agreement are not final agency actions because although the USTR completed negotiations on the trade agreement, Agreement will have no effect on plaintiffs unless and until the President acts. In *Public Citizen*, the plaintiff sought to compel the USTR to prepare an environmental impact statement for the North American Free Trade Agreement ("NAFTA"). *Id.* at 550. The court stated that "[t]he President is not obligated to submit any agreement to Congress, and until he does, there is no final action. If and when the agreement is submitted to Congress, it will be the result of action by the President, action clearly not reviewable under the APA." *Id.* at 551–52. Accordingly, the court held that the USTR's refusal to produce the environmental impact statement was not subject to judicial review as the "final agency action" challenged was the submission of NAFTA to Congress by the President, which is unreviewable under the APA. *Id.* at 553.

In the instant case, defendants claim that the USTR has similarly not taken any final agency action that would permit review under the APA or 28 U.S.C. § 1581(i). Instead, defendants assert that Congress reserved this responsibility exclusively for the President, providing that "*the President* may proclaim—(1) the modification of any duty or staged rate reduction of any duty set forth in Schedule XX." 19 U.S.C. § 3521(b) (emphasis added). Unless and until the President exercises this discretionary authority, defendants maintain that the Agreement will not be implemented and tariffs on information technology will not be reduced. Defendants argue that it is only the President's Proclamation that "will directly affect the parties" and, thus, the USTR's conduct in negotiating the Agreement is not subject to judicial review.

Plaintiffs also named the Commissioner of Customs as a defendant. Defendants argue, however, that no Customs "decision" has been placed in issue by plaintiffs' complaint. Plaintiffs are domestic interested parties who contend that the rate of duty to be charged on imported capacitors and resistors will be too low. Defendants assert that under the controlling case law, plaintiffs cannot obtain judicial review of the President's Proclamation through the "back door" by challenging Customs' ministerial action of not collecting duties on capacitors and resistors. *See United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 200–01, 544 F. Supp. 883, 886–87 (holding that suit against the Customs Service under 28 U.S.C. § 1581(a) would be untenable, as Customs lacked the authority to grant relief from the Presidential Proclamation imposing a sugar quota), *aff'd*, 683 F.2d 399 (C.C.P.A. 1982). Defendants contend that as it is the Presidential Proclamation that sets the tariff rates at issue, rather than any action by the USTR or the Customs Commissioner, as any action by subordinate officials would not constitute final agency action.

Defendants, however, misread *United States Cane Sugar Refiners' Association*. The court did not dismiss the suit for lack of standing or jurisdiction. Instead, the court found it unnecessary for plaintiffs to ex-

haust their administrative remedies by first attempting to make an entry of sugar only to have it denied by Customs and unreasonable to force plaintiffs to challenge the validity of the Presidential Proclamation via a protest to Customs. *Id.* at 200–01, 544 F. Supp. at 886–87. As Customs officials had no authority to override the Presidential Proclamation and admit the over-quota sugar, the court found exhaustion of administrative remedies to be futile under the circumstances and jurisdiction pursuant to 28 U.S.C. § 1581(i), rather than 28 U.S.C. § 1581(a). *Id.* at 201, 544 F. Supp. at 887; *see also United States Shoe Corp. v. United States*, 114 F.3d 1564, 1570–71 (Fed. Cir. 1997) (holding that as the collection of the Harbor Maintenance Tax does not involve a protestable decision on the part of Customs, jurisdiction did not arise under 28 U.S.C. § 1581(a), but rather under 28 U.S.C. § 1581(i)).

Plaintiffs have not invoked the APA as the basis for this court's jurisdiction. Instead, plaintiffs rely upon 28 U.S.C. § 1581(i)(2) (1994) (providing that "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—* * * (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue") and 28 U.S.C. § 2201(a) (1994) (providing that "any court of the United States * * * may declare the rights and other legal relations of any interested party").

Defendants contend that neither of these statutes provides a cause of action nor an explicit waiver of sovereign immunity necessary for plaintiffs' challenge to the President's authority to issue the proclamation implementing the Agreement. In the light of the Supreme Court's unequivocal holding that "the President is not an agency within the meaning of the [APA]," *Franklin*, 505 U.S. at 796, defendants argue that plaintiffs cannot invoke section 702's cause of action or waiver of sovereign immunity. Defendants claim that although 28 U.S.C. § 1581(i)(2) provides for jurisdiction over plaintiffs' claims, it does not provide a cause of action, nor does it contain an express waiver of sovereign immunity allowing a party to obtain relief against a federal official. Furthermore, defendants assert that 28 U.S.C. § 2631(i) neither creates a right of action nor waives the sovereign immunity of the United States, but merely permits a plaintiff to commence an action in this court under 28 U.S.C. § 1581(i), if it has been aggrieved by agency action within the meaning of the APA. Finally, defendants claim that the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, provide no basis for jurisdiction, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950), much less a cause of action or waiver of sovereign immunity.[7]

The court notes, however, that while Congress adopted 5 U.S.C. § 702 as part of the APA, the waiver of sovereign immunity in § 702 applies to any proceeding in which a party seeks declaratory or injunctive relief re-

[7] As 28 U.S.C. § 1581(i) provides jurisdiction, the court does not address 28 U.S.C. §§ 2201–02 and 28 U.S.C. § 2631(i) as alternative bases for jurisdiction.

garding any federal official's *ultra vires* conduct under color of legal authority. *See, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not."); *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984). Moreover,

> where [an executive] officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden.

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949). "So, there is no sovereign immunity to waive—it never attached in the first place." *Chamber of Commerce*, 74 F.3d at 1329.

Non-statutory review of executive action was recognized in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). In *McAnnulty*, plaintiffs sought an injunction against a subordinate official carrying out an order of the Postmaster General. The Court, granting relief, stated that

> acts of all [a government department's] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. * * * Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.

Id. at 108–09.

This reasoning has been recognized repeatedly. In *Stark v. Wickard*, 321 U.S. 288 (1944), plaintiffs sought to enjoin the Secretary of Agriculture for allegedly exceeding his statutory authority. *Id.* at 289. The relevant statute did not provide for judicial review for plaintiffs, but the Court observed that "[t]he responsibility of determining the limits of statutory grants of authority * * * is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Id.* at 310. In a case relying on *McAnnulty*, the Court stated that "[g]enerally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon v. Brucker*, 355 U.S. 579, 581–82 (1958). Courts will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986).

While relief against the President himself is extraordinary, though arguably possible for the performance of a ministerial duty, *see Franklin*, 505 U.S. at 802, injunctive relief is generally available to preclude *ultra vires* conduct by subordinate executive officials. *See Soucie v. David*, 448 F.2d 1067, 1072 n12 (D.C. Cir. 1971) ("courts have power to compel

subordinate executive officials to disobey illegal Presidential commands" (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952))); *see also Swan v. Clinton*, 100 F.3d 973, 977–81 (1996). Thus, the court may review Presidential action to determine if it complies with a statute and the court may order the USTR, as the President's trade agreement negotiating agent, and the Commissioner of Customs to comply with statutory limitations. Plaintiffs need not assert a further cause of action or waiver of sovereign immunity. *See Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (holding President's action is reviewable only "to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with the relevant procedural requirements.").[8]

Defendants' assertions that *Franklin* and *Dalton* limit this review are unpersuasive. In *Franklin*, the Court stated that although the President's actions are not reviewable for abuse of discretion under the APA, they may still be reviewed for constitutionality. 505 U.S. at 801 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). The Court went on to state that "[w]hile injunctive relief against executive officials like the Secretary of Commerce is within the court['s] power, *see Youngstown Sheet & Tube Co.[*,343 U.S. at 579], the District Court's grant of injunctive relief against the President himself is extraordinary." *Id.* at 802. Furthermore, in *Dalton*, the Court stated that

> We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA. *See Dames & Moore v. Regan*, 453 U.S. 654, 667 * * * (1981). But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.

511 U.S. at 474. As the court's review is limited to whether the statutory prerequisites of 19 U.S.C. § 3521(b) were met prior to the President's Proclamation implementing the Agreement, no discretionary decision of the President is at issue. Accordingly, the court finds that plaintiffs' claims are judicially reviewable.

B. *Standing:*

Defendants argue that plaintiffs lack standing because they have failed to identify a "legal wrong" within the meaning of 5 U.S.C. § 702. *See Pennsylvania R.R. Co. v. Dillon*, 335 F.2d 292, 294 (D.C. Cir. 1964) ("legal wrong" for purposes of APA § 10(a) means "the invasion of a legally protected right"). Defendants claim that the only "legal wrong" alleged by plaintiffs is the President's modification of the duties on imports of capacitors and resistors. The Supreme Court, however, has stated that "[n]o one has a legal right to the maintenance of an existing rate or duty." *United States v. George S. Bush & Co. Inc.*, 310 U.S. 371,

[8] Even if the court were concerned that some of the language of *Franklin* and *Dalton* may indicate a move in a direction different from that taken in *United States Cane Sugar Refiners' Association* and *Florsheim*, the holdings of the case are compatible. Accordingly, the Federal Circuit precedent remains binding and cannot be ignored.

379 (1940) (quoting *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933)); *see also North Am. Foreign Trading Corp. v. United States*, 783 F.2d 1031, 1032 (Fed. Cir. 1986) ("No vested right to a particular classification or rate of duty or preference is acquired at the time of importation.").

As plaintiffs do not have a constitutional or inherent right to the level of duties they prefer, defendants claim that plaintiffs must identify a statute affording them a specific legal right that the government has adversely affected through agency action, as required by 5 U.S.C. § 702. Defendants argue that plaintiffs have identified no such right. Defendants assert that Section 111(b) of the URAA does not create a zone of protection for plaintiffs as the statute does not indicate that Congress sought to confer legal rights on any class of domestic producers.

The Supreme Court has recognized that the standing doctrine has both constitutional and prudential aspects. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The constitutional aspect of standing is grounded in Article III's requirement of a case or controversy. *Id.* at 750–51. The Federal Circuit has noted that

> To satisfy this aspect of the standing doctrine, the plaintiff must not only have experienced some concrete injury-in-fact, but "[t]he injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision."

Sacilor, Acieries Et Laminoirs de Lorraine v. United States, 815 F.2d 1488, 1491 (Fed. Cir. 1987) (quoting *Allen*, 468 U.S. at 751 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976))); *see also Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997). In the present case, affidavits and testimony submitted by plaintiffs indicate sufficient injury-in-fact for standing purposes, as the reduction in tariffs on imported capacitors and resistors is likely to cause plaintiffs some loss of U.S. market share or some lowering of prices to meet the lowered prices of its imported competition. A favorable decision to plaintiffs would permit relief from this injury as the reduction on the tariffs for capacitors and resistors would be enjoined.

The prudential aspect of the standing doctrine is derived, in the administrative context, from the requirement of 5 U.S.C. § 702 that a plaintiff challenging agency action must be "adversely affected or aggrieved." 5 U.S.C. § 702; *Sacilor*, 815 F.2d at 1491.[9] This inquiry rests on whether "'the interest sought to be protected by the complainant [is] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396 (1987) (quoting *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970)). In applying this "zone of interest" test, the Court stated that, "[t]he essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to

[9] The court does not read 28 U.S.C. § 2631(i) to limit standing to persons aggrieved by final discretionary action of agency officials. Section 702 of Title 5, referred to in 28 U.S.C. § 2631(i), has application beyond the APA. *See, supra*, discussion. Furthermore, the test of 28 U.S.C. § 2631(i) requires a certain injury or effect; it is unconcerned with whether or not the action is brought under the APA.

be relied upon to challenge agency disregard of the law.'" *Id.* at 399 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 374 (1984))(alteration in original). The Court further stated that,

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding;[ ] in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Id. at 399–400.

In the light of the foregoing, plaintiffs appear to be able to satisfy the "zone of interest" test. Section 111 of the URAA was enacted to enable the President to complete negotiations on "zero-for-zero" tariff eliminations which had begun during the Uruguay Round. The statute sets out limitations on the President's tariff modification authority. 19 U.S.C. § 3521. If that authority is exceeded by a negotiated agreement encompassing products other than those Congress intended, domestic producers are logical plaintiffs to contest the President's alleged disregard for the law. In any case, plaintiffs are not marginally related to the interests sought to be protected by section 111's limitations, and, thus, plaintiffs need not identify another statute providing a cause of action. *See supra* IIA. Accordingly, the court finds that plaintiffs have standing to challenge the actions of the executive branch in regard to the Presidential Proclamation at issue.

C. *Failure to State a Claim:*

Defendants contend that plaintiffs have failed to state a claim upon which relief can be granted in Counts I and II of their complaint, which challenge the constitutionality of Congress' delegation of law-making power to the President. The court finds that the parties make no new arguments to change the court's view of this issue from that expressed in *Kemet Electronics Corp.*, Slip Op. 97–84, at 7–8, 1997 WL 369642, at *3. As a matter of law, plaintiffs cannot succeed upon this claim. Accordingly, the court grants defendants' motion to dismiss with regard to Counts I and II.

Defendants also argue that plaintiffs fail to state a claim upon which relief can be granted with regard to Counts III and IV, which claim that the President exceeded the scope of his statutory proclamation authority by reducing tariffs on capacitors and resistors, which are alleged not to be the subject of reciprocal duty elimination negotiations during the Uruguay Round. Counts III and IV raise factual issues that cannot be resolved on the pleadings. Accordingly, defendants' motion to dismiss with respect to Counts III and IV is denied.

Defendants further assert in Count V of the complaint that plaintiffs lack standing to challenge the President's authority to negotiate and proclaim tariff reductions for products not produced by plaintiffs. Plaintiffs argue that machine tools were mentioned merely as an example of the USTR's allegedly *ultra vires* conduct. As Count V, however, does not involve products which plaintiffs produce, the court grants defendants' motion to dismiss with regard to Count V. *See McKinney v. United States Dept. of Treasury*, 799 F.2d 1544, 1554 (Fed. Cir. 1986) (dismissing complaint for lack of standing where plaintiffs have not alleged a cognizable injury).

Finally, defendants claim that plaintiffs fail to state a claim upon which relief may be granted with respect to Counts VI and VII of the complaint, which relate to whether the President, acting through the USTR, failed to obtain statutorily required advice. Defendants submit documents attempting to prove that the USTR did in fact obtain the statutorily required advice. Defendants, however, cannot rely on factual evidence to support a motion to dismiss for failure to state a claim.

On a motion to dismiss for failure to state a claim pursuant to USCIT Rule 12(b)(5), the court assumes "all well-pled factual allegations are true" and construes "all reasonable inferences in favor of the nonmovant" in resolving whether the complaint sets forth facts sufficient to support a claim. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). "To determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference." *Fabrene, Inc. v. United States*, 17 CIT 911, 913 (1993) (citing *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991)). Accordingly, despite defendants' evidence, the court finds that plaintiffs have alleged facts sufficient to state a claim. Defendants' motion to dismiss with respect to Counts VI and VII is denied.

CONCLUSION

Plaintiffs' motion for a preliminary injunction is denied. Defendants' motion to dismiss is granted with respect to Counts I, II, and V of the complaint; it is denied as to Counts III, IV, VI, and VII.

(Slip Op. 97–116)

SHIELDALLOY METALLURGICAL CORP., PLAINTIFF *v.*
UNITED STATES, DEFENDANT *v.* GALT ALLOYS INC., DEFENDANT-INTERVENOR

Court No. 95–08–01034

[Commerce's remand determination affirmed.]

(Decided August 20, 1997)

Harris & Ellsworth (Cheryl Ellsworth, Jennifer de Laurentiis) for Plaintiff.
Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Lydia K. Griggsby);* Of Counsel, *David W. Richardson*, Attorney-Advisor, Office of Chief Counsel for Import Administration, Department of Commerce, for Defendant.
Ross & Hardies (Jeffrey S. Neeley) for Defendant-Intervenor.

OPINION

POGUE, *Judge:* On November 19, 1996, this Court remanded certain aspects of the International Trade Administration's final determination in *Ferrovanadium and Nitrided Vanadium from the Russian Federation*, 60 Fed. Reg. 27,957 (Dep't Commerce 1995)(final determ.). The remand Order directed Commerce to "correct misleading language * * * regarding calculation of the surrogate price of vanadium slag; and to explain its use of Tulachermet's factors of production data to calculate foreign market value for Odermet, and its use of Galt as exporter-respondent." *Shieldalloy Metallurgical Corp. v. United States*, 947 F. Supp. 525, 539 (CIT 1996). Familiarity with the Court's earlier decision in this case is presumed. This matter is now before the Court following Commerce's remand determination.

DISCUSSION

1. VALUATION OF VANADIUM SLAG

In its decision ordering the remand, this Court upheld Commerce's methodology for determining the value of vanadium slag, a raw material for vanadium pentoxide. *Id.* at 532. The Court concluded that Commerce's methodology was in accordance with law and that its application was based on substantial evidence on the record. *Id.*

The Court remanded this issue solely to give Commerce the opportunity to correct misleading language in the Final Determination which suggested that Commerce used prices for products of Russian origin in calculating foreign market value. The Court explained that this language was significant because for purposes of the investigation Commerce treated Russia as a non-market economy ("NME") country and "because the statute specifies that in cases where the merchandise under investigation is exported from a NME, foreign market value" is to be based on values of factors of production in a market economy country or countries. *Id.*

On remand, Commerce corrected the misleading language to say, "[T]he 90% prices *correspond* to the levels reported for the Russian

products." Remand Determ. at 2. The corrected language is consistent with the language used in Commerce's valuation memorandum, in which the Department explained its method for valuing vanadium slag, *inter alia*. (Pub. Doc. 277 at 2–3).

Plaintiff objects to Commerce's remand determination, arguing that Commerce should have re-opened the record to obtain further information on the prices reported in the original record. However, Shieldalloy has failed to provide the Court with any evidence to suggest that the prices in question were of Russian origin. Commerce's mistake in the Final Determination can not be considered evidence and the corrected language properly reflects the evidence contained in the administrative record. *See* Final Valuation Memo. (Pub. Doc. 277) at 3 ("[T]he vanadium section in *South Africa's Industry 1993/94* (Industry Report) * * * shows that the * * * 90% prices [listed in the *Metal Bulletin] correspond* to the levels reported for the Russian products.") (emphasis added). Accordingly, this aspect of the remand determination is sustained.

2. Use of Tulachermet's Factors of Production Values

In its remand determination, Commerce provided reasons for applying Tulachermet's verified factors of production data to determine foreign market value for Odermet's margin calculation and set forth the evidence supporting its decision. *See* Remand Determ. at 3–5.

Commerce explained that Odermet is a third country exporter of the subject merchandise. The statute directs Commerce to calculate foreign market value for merchandise from a nonmarket economy using "the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1)(1988). Commerce verified that the subject merchandise exported to the U.S. by Odermet was produced by Tulachermet. Commerce also verified Tulachermet's factors of production data.

Plaintiff objects to Commerce's determination, arguing that Commerce should have based its foreign market value determination on information provided in plaintiff's petition or on verified information from Chusovoy, a different producer, because Tulachermet's questionnaire response was deficient.

Commerce responds and the administrative record demonstrates that the deficiencies in Tulachermet's questionnaire related to U.S. sales and not to the factors of production data which Commerce had verified. *See* Memo. re: Verification of the Questionnaire Response of SC Vanadium-Tulachermet, April 6, 1995 (Pub. Doc. 255). Moreover, Commerce could not resort to adverse best information available because Odermet complied with all information requests. *See Olympic Adhesives v. United States*, 8 Fed. Cir. (T) 69, 899 F.2d 1565, 1574 (1990) ("[The statute] clearly requires *noncompliance with an information request* before resort to the best information rule is justified, whether due to refusal or mere inability.") In the Remand Determination Commerce identifies evidence showing that Odermet responded to all requests for information, and that all of Odermet's responses were verified. *See* Re-

mand Determ. at 4–5. Accordingly, Commerce's determination is sustained.

3. THE USE OF GALT AS EXPORTER-RESPONDENT

In its decision ordering remand, this Court concluded that substantial evidence on the record supported Commerce's conclusion that Galt was related to its joint venture with the Dutch company Hascor BV. The statute contains several provisions directing Commerce to ignore transactions between related parties. For example, 19 U.S.C. § 1677a (1988) requires Commerce to use different data to determine United States price depending on whether the exporter and the United States purchaser are related or unrelated.[1] Commerce must also disregard transactions between the foreign producer and its related suppliers when foreign market value is based on constructed value. *See* 19 U.S.C. §§ 1677b(e)(2) and (3) (1988). As Commerce explained in the remand determination, the reason Commerce ignores certain related party transactions "is that Congress did not want to put an exporter in the position of being able to manipulate the dumping calculations * * *. Such manipulation could occur through transfer pricing between related parties. One party could sell the subject merchandise at a high price to a related party, who then in turn could sell it to an unrelated purchaser for exportation to the United States at a low price." Thus Commerce's decision here to rely on sales to the first unrelated party in determining United States price was a reasonable application of the statute.

As Galt was the first party to sell to an unaffiliated purchaser, Commerce used Galt's sales as the basis for determining United States price.

However, because language in Commerce's Final Determination implied reliance on the "knowledge" test[2] in determining the proper exporter-respondent the Court ordered Commerce to explain on remand its decision to treat Galt as the proper exporter-respondent for purposes of calculating United States price.

On remand, Commerce explained that Galt's verified questionnaire response established that Galt was the company that set prices, quantities and delivery terms to the first unrelated customer in the United States. Thus substantial evidence supports Commerce's decision to treat Galt as the proper exporter-respondent for purposes of its investigation.

Plaintiff objects to the remand determination because its interpretation of Galt's questionnaire response and the verification report differs

[1] Specifically, if the exporter and United States purchaser are not related, Commerce is to use "purchase price," the "price at which merchandise is purchased, or agreed to be purchased, * * * from a reseller or the manufacturer or producer of the merchandise for exportation to the United States. If the exporter and United States purchaser are related, Commerce is to use "exporters sales price," the price at which merchandise is sold or agreed to be sold in the United States" to the first unrelated purchaser. *See* 19 U.S.C. §§ 1677a(b) and (c).

[2] This test is used to determine foreign market value for importation from an intermediate country, 19 U.S.C. § 1677b(f) (1988). Knowledge may also be an issue when Commerce is deciding whether to use the price charged by the producer to the middleman, or the middleman to the United States purchaser as purchase price. According to the legislative history of the Trade Agreements Act of 1979, "If a producer knew that the merchandise was intended for sale to an *unrelated purchaser* in the United States under terms of sale fixed on or before the date of importation, the producer's sale price to an *unrelated middleman* will be used as the purchase price." S. Rep. No. 96–249 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381 (emphasis added). Because of the relationship between Galt and Galt/Hascor the knowledge test was not relevant here.

from that of Commerce. (Pl. Shieldalloy Metallurgical Corp.'s Comm. Commerce Dep't.'s Remand Determ. at pp.18–20).

It is not the Court's role, however, to re-weigh the evidence; rather the Court insures that Commerce's determinations are supported by substantial evidence. See 19 U.S.C. § 1516a(b)(1)(B)(i)(1988). Commerce's verification of Galt's sales data provides such evidence.

Accordingly, the remand results are sustained.

(Slip Op. 97–117)

NEC CORP. AND HNSX SUPERCOMPUTERS, INC., PLAINTIFFS *v.* U.S. DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS, AND CRAY RESEARCH, INC., DEFENDANT-INTERVENOR

Court No. 96–10–02360

[Judgment entered for Defendants.]

(Dated August 20, 1997)

Paul, Weiss, Rifkind, Wharton, & Garrison (Robert E. Montgomery, Jr., Terence J. Fortune, Robert P. Parker, David J. Weiler, Swati Agrawal) for Plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director; *Sharon Y. Eubanks*, Deputy Director, *A. David Lafer*, Attorney, *Jeffrey M. Telep*, Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Patrick V. Gallagher*, Attorney-Advisor, *Lucius B. Lau*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for Defendant.

Wilmer, Cutler & Pickering (John D. Greenwald, Michael L. Burack, Charles S. Levy, Brigida Benitez, Stuart M. Weiser) for Defendant-Intervenor.

OPINION

POGUE, *Judge:* Plaintiffs NEC Corp. and HNSX Supercomputers, Inc. (collectively, "NEC") commenced this action to enjoin the United States Department of Commerce ("Commerce") from conducting an antidumping investigation of *Vector Supercomputers from Japan*. NEC claims that Commerce prejudged the investigation.

Defendant moved to dismiss NEC's complaint for lack of jurisdiction and for failure to state a claim. *See* USCIT Rs. 12b(1) and (5). The Court denied Defendant's motion and entered an expedited trial schedule, with the intent to consolidate the preliminary injunction hearing with the trial on the merits. *See NEC Corp. v. United States*, Court No. 96–10–02360 (Mem. Op. and Order, Dec. 18, 1996).

Subsequently, the Court defined the scope of discovery and scheduled document production and depositions. *See NEC Corp. v. United States*,

21 CIT ___, 958 F. Supp. 624 (CIT 1997).[1] On March 4, 1997, the Court issued a protective order for documents produced by Defendant that were covered by certain statutory privileges, the attorney-client privilege, the "state secrets privilege," and the "official information" (or "deliberative process") privilege. *See NEC Corp. v. United States*, Court No. 96–10–02360 (Order, Mar. 4, 1997). The impending issuance of a preliminary determination in the underlying antidumping investigation prevented consolidation of the preliminary injunction hearing with the trial on the merits. The preliminary injunction hearing was held on March 14, 1997. On March 21, 1997, the Court denied NEC's application for a preliminary injunction. *See NEC Corp. v. United States*, Court No. 96–10–02360, (Mem. Op. and Order on Pls.' Mot. for Prelim. Inj., Mar. 21, 1997).

On April 7, 1997, Commerce issued its preliminary determination. *See Vector Supercomputers from Japan*, 62 Fed. Reg. 16,544, 16,547 (Dep't Commerce 1997) (prelim. determ.). NEC did not respond to the investigation questionnaire, citing the instant action as the reason for nonparticipation. *Id.* at 16,545. Without NEC's price information and cost data, Commerce used the "facts otherwise available"[2] to calculate a 454 percent dumping margin for NEC. *Id.*

The Court conducted a three-day trial on April 14, 15, and 21, 1997, to determine whether Commerce had prejudged the supercomputer investigation.[3]

Structure and Administration of the Antidumping Statute

The United States antidumping statute bifurcates investigations between two different federal agencies: the Department of Commerce, which makes less than fair value determinations for a class or kind of foreign merchandise; and the International Trade Commission ("ITC"),[4] which makes injury determinations.[5] If Commerce determines that a class or kind of foreign merchandise is being, or is likely to be sold in the United States at less than its fair value ("LTFV," i.e., at a price which is lower than the price at which the merchandise is sold in the country of exportation or to a third country), and the ITC determines that an industry in the United States is materially injured or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of the sub-

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[1] Prior to issuance of the Court's February 12, 1997, Discovery Order, Defendant petitioned the Court of Appeals for the Federal Circuit for a writ of mandamus to quash the Court's discovery order rendered at the conclusion of several telephone conferences. *See* Tr. of Jan. 8, 1997, Tel. Conf. (#040); Tr. of Jan. 15, 1997, Tel. Conf. (#053); Tr. of Jan. 24, 1997, Tel. Conf. (#062). The Federal Circuit denied the writ application.

[2] *See* Section 776 of the Tariff Act of 1930, as amended 19 U.S.C. § 1677e(a)(2)(B) ("If an interested party * * * fails to proved such information by the deadlines for submission of the information * * * the administering authority * * * shall, * * *, use the facts otherwise available in reaching the applicable determination under this subtitle."). All further citations to the antidumping statute are to the section in Title 19 of the U.S. Code.

[3] The Court wishes to acknowledge the considerable efforts throughout this litigation of counsel for all parties; their cooperation in assembling the record was especially appreciated.

[4] The International Trade Commission is an independent federal agency with investigative powers on trade matters. *See* 19 U.S.C. § 1332 (1994).

[5] NEC's suit does not encompass the ITC investigation. NEC participated in the ITC's injury investigation. *See Vector Supercomputers from Japan*, 61 Fed. Reg. 50,331 (ITC 1996) (prelim. injury determ.). What NEC challenges here is Commerce's ability to make the less than fair value determination.

ject merchandise, Commerce issues an antidumping order directing the United States Customs Service to collect antidumping duties equal to the amount by which the normal value (i.e., the price in the foreign market) exceeds the export price (i.e., the U.S. price) for the merchandise. 19 U.S.C. § 1673 (1994). That amount is the dumping margin. 19 U.S.C. § 1677(35)(A) (1994).

The antidumping law requires the Secretary of Commerce, or any other officer to whom the responsibility for carrying out the duties of the statute are transferred, to administer antidumping investigations. *See* 19 U.S.C. § 1677(1) (1994). Antidumping investigations may be commenced in two ways. An interested party may file a petition alleging the elements necessary for an antidumping duty, 19 U.S.C. § 1673a(b), or Commerce may self-initiate an investigation. 19 U.S.C. § 1673a(a); 19 C.F.R. § 353.11 (1996). Prior to self-initiation, Commerce prepares a "predecisional" analysis of the imports in question based on information available.[6]

Once commenced, the antidumping investigation proceeds through a preliminary and final determination, *see* 19 U.S.C. §§ 1673b(b), 1673d(a) (1994), unless the ITC issues a negative injury determination. *See* 19 U.S.C. § 1673d(c)(2),(3). The purpose of the preliminary determination is to determine whether there is a reasonable basis to believe or suspect that the merchandise which is the subject of the investigation is being sold, or is likely to be sold at LTFV. *See* 19 U.S.C. § 1673b(b) (1994); 19 C.F.R. § 353.15 (1996). The purpose of the final determination is to determine whether the merchandise which is the subject of the investigation is being or is likely to be sold at LTFV. *See* 19 U.S.C. § 1673d(a) (1994); 19 C.F.R. § 353.20. The preliminary and final determinations are based on information presented to or obtained by Commerce during the course of the proceeding. 19 U.S.C. § 1516a(b)(2) (1994) Information not placed on the record may not influence the outcome of the investigation, *see id.*, or be considered for purposes of judicial review. *See Beker Indus. Corp. v. United States*, 7 CIT 313, 315–18 (1984).

The statute requires Commerce to hold a hearing upon the request of any interested party to the investigation prior to its final determination, *see* 19 U.S.C. § 1677c (1994); 19 C.F.R. § 353.38(b) (1996), and requires Commerce to address, in the final determination, arguments made at the hearing regarding the proper methodology for the dumping calculations at issue. *See* 19 U.S.C. § 1677f(i)(3)(A) (1994).

The statute also requires Commerce to consider information submitted by parties to an investigation, to inform a party if its submission in response to Commerce's request for information is deficient, and to provide the submitting party with an opportunity to remedy or explain its submission. *See* 19 U.S.C. § 1677m(d) (1994).

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[6] *See* Tr. Powell Trial Test. at 188, Ct. Doc. #177 (Ct. Doc. refers to the document number recorded on the official docket sheet, which is maintained by the Court's Clerk).

The statute further requires Commerce to consider information that is submitted by an interested party and is necessary to the preliminary or final determination if (1) the information is submitted within the deadline for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting Commerce's requirements, and (5) the information can be used without undue difficulties. *See* 19 U.S.C. § 1677m(e) (1994).

Additionally, the statute requires Commerce to "verify all information relied upon in making a final determination of an investigation." 19 U.S.C § 1677m(i)(1) (1994); 19 C.F.R. § 353.36(a)(i) (1996).

Congress intended antidumping investigations to be "transparent." *See* S. Rep. No 96–246, at 38, 41 (1979), *reprinted in* 1979 U.S.C.C.A.N. 424, 427.[7] Included in the record of the proceedings is a record of any ex parte meeting between interested parties, (or other persons providing factual information in connection with a proceeding), and the person charged with making the determination, (or any person charged with making a final recommendation to that person), in connection with that proceeding. *See* 19 U.S.C. § 1677f(3) (1994); 19 C.F.R. § 353.35 (1996). Interested parties have the opportunity to submit factual information to rebut, clarify, or correct the factual submissions of another interested party. *See* 19 C.F.R. § 353.31(2) (1996). Interested parties also may submit case briefs that present their arguments on issues relevant to the final determination. *See* 19 C.F.R. § 353.38(2) (1996).

Commerce addresses issues prior to and again following the preliminary determination.[8] Commerce re-examines its analysis between the preliminary and the final determination.[9] The investigation may produce a dumping margin in a preliminary determination that is different from the margin forecast in a self-initiated predecisional analysis (or alleged in a petition pursuant to which an investigation was initiated), and the dumping margin in the final determination may differ significantly from the dumping margin in the preliminary determination.[10]

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[7] "Other significant changes in existing law adopted in this title included * * * greater transparency of investigations," S. Rep. No 96–246, at 38 (1979), *reprinted in* 1979 U.S.C.C. A.N. 424; "The major common elements of the [Subsidies Agreement and the Antidumping Code] are: * * * 3. Provisions for 'transparency' in all phases of a * * * dumping case, * * *." *Id.* at 41, *reprinted in* 1979 U.S.C.C.A.N. 427. *See also* H. Rep. No. 96–317, at 45 (1979) ("With the rise in the number of foreign antidumping proceedings by Code parties, * * *, the United States has become increasingly concerned that other countries utilize open public proceedings, similar to those in the United States, to ensure importers and exporters are treated fairly.").

[8] *See* Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 222–23.

[9] *Id.* at 223, 236.

[10] *Id.*; *Compare Certain Pasta From Italy*, 61 Fed. Reg. 1,344, 1,351 (Dep't Commerce 1996) (prelim. determ.) (22.15%), *with* 61 Fed. Reg. 42,231, 42,232 (final determ.) (0.00%); *compare Polyvinyl Alcohol From the People's Republic of China*, 60 Fed. Reg. 52,547, 52,649 (Dep't Commerce 1995) (prelim. determ.) (187.56%), *with* 61 Fed. Reg. 14,057, 14063 (final determ.) (0.00%); *compare Manganese Metal From the People's Republic of China*, 60 Fed. Reg. 37,875 (Dep't Commerce 1995) (amend. prelim. determ.) (82.44%), with 61 Fed. Reg. 4,415, 4,418 (amend. final determ.) (0.97%).

Judicial review of Commerce's final determination is available in the U.S. Court of International Trade. *See* 28 U.S.C. § 1581(c);[11] 19 U.S.C. § 1516a(a)(2)(B)(i). The court reviews the determination to insure Commerce's action is in accordance with law and supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

Subject to any policies and directives the Secretary may prescribe, the authority to conduct investigations and make all determinations in antidumping proceedings has been delegated to the Under Secretary for International Trade, the head of the International Trade Administration, pursuant to Department of Commerce Organization Order 10–3 at § 4.01b.[12] Subject to any policies and directives the Under Secretary may prescribe, the Under Secretary, in turn, has delegated the authority to conduct investigations and make all determinations in antidumping proceedings to the Assistant Secretary for Import Administration. *See* Department of Commerce Organization and Function Order 41–1 Amendment 3 at § 1.01d.[13]

The Assistant Secretary for Import Administration is the head of Import Administration. The Assistant Secretary exercises the functions of the Under Secretary and the administering authority under the U.S. antidumping law, including responsibility for the initiation of investigations, and for ensuring the proper administration of the antidumping laws. *See* Department of Commerce Organization and Function Order 41–1 at § 2. By virtue of this delegation, the Assistant Secretary for Import Administration is the decisionmaker in antidumping investigations. The Assistant Secretary for Import Administration reports to the Under Secretary of Commerce for International Trade. The Under Secretary may give general policy guidance to the Assistant Secretary regarding administration of the antidumping statute, but is not involved in the conduct of, or the determinations issued in connection with, specific investigations. *See* Department of Commerce Organization and Function Order 41–1, Amendment 3 at § 1.01d.

As head of Import Administration, the Assistant Secretary for Import Administration supervises Import Administration staff. Since June 4, 1996, Import Administration staff have been organized into three Anti-

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[11] The Court exercised jurisdiction over this action pursuant to 28 U.S.C. § 1581(i), the Court's residual jurisdiction provision. *See Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States*, 13 CIT 584, 585, 717 F. Supp. 847, 849 (1989). For § 1581(i) jurisdiction to attach, relief under another section (in this case § 1581(c)) must be "manifestly inadequate." *Miller & Co. v. United States*, 5 Fed. Cir. (T) 122, 124, 824 F.2d 961, 963 (1987). In an earlier order, the Court held that requiring exhaustion of administrative remedies, *see* 28 U.S.C. § 2637(d); *B-West Imports, Inc. v. United States*, 880 F. Supp. 853, 858–59 (CIT 1995), would be inappropriate for NEC's claim of prejudgment given that the remedy of disqualification of a biased decisionmaker could be granted at the outset of the investigation, avoiding the need to undo a complicated administrative proceeding if the actionable allegations in NEC's complaint proved to be true. *See NEC Corp. v. United States*, Court No. 96–10–02360 at 3 (Mem. Op. and Order, Dec. 18, 1996) If the matter was in fact prejudged, requiring NEC to submit to an administrative process rendered a hollow formality by the prejudgment, *see infra* p. 29, would not provide an adequate remedy. *See Barry v. Barchi*, 443 U.S. 55, 63 n.10, 99 S. Ct. 2642, 2648 n.10 (1979) ("Under existing authority, exhaustion of administrative remedies is not required when 'the question of the adequacy of the administrative remedy * * * [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'") (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575, 93 S. Ct. 1689, 1696 (1973)); *McCarthy v. Madigan*, 503 U.S. 140, 148, 112 S. Ct. 1081, 1088 (1992) (stating that exhaustion of administrative remedies may not be required "where the administrative body is shown to be biased or has otherwise predetermined the issue before it.").

[12] The Department of Commerce Organization Order is publicly available through the Commerce Department, but not separately published in any secondary source.

[13] The Department of Commerce Organization and Function Order is publicly available through the Commerce Department, but not separately published in any secondary source.

dumping and Countervailing Duty Groups, each of which is headed by a Deputy Assistant Secretary. *See* Department Organization and Function Order 41–1 at § 2.04b. Antidumping investigations are managed on a day-to-day basis by an Import Administration investigation team that works under a Deputy Assistant Secretary.[14] Each investigation team normally is comprised of one or more import compliance specialists, one or more accountants, an attorney, and a policy analyst.[15] The team is supervised by the Office Director and may have a team leader.[16] The accountant, attorney and policy analyst are assigned by their respective offices.[17] For accounting, legal, and policy issues, the attorney, the accountant, and the policy analyst report directly to their respective supervisors.[18] The team solicits, collects and analyzes information submitted for the record of the investigation and presents issues to the Assistant Secretary for decision, along with the team's recommendations on those issues.[19]

FACTUAL BACKGROUND

The University Corporation for Atmospheric Research ("UCAR") is a research consortium funded in part by the National Science Foundation ("NSF"), an independent Executive Branch agency of the U.S. Government. In March 1995, UCAR initiated a bidding process to procure advanced supercomputers.[20] As a result of this process, three companies—Federal Computing Corporation ("FCC"), supplying vector supercomputers produced by NEC Corporation ("NEC"), Cray Research, Inc. ("Cray") and Fujitsu Limited ("Fujitsu")—were invited to submit a "best and final offer."[21]

Guided by its obligation to assure that the procurement process was free of "noncompetitive practices,"[22] on or about March 3, 1996, NSF instructed UCAR to obtain evidence that no dumping was involved in

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[14] Each Deputy Assistant Secretary is responsible for managing the antidumping proceedings assigned to their respective groups and each reports directly to the Assistant Secretary for Import Administration. *See* Department of Commerce Organization and Function Order 41–1 at § 2.04. The antidumping investigation of Vector Supercomputers from Japan is being conducted by members of Antidumping and Countervailing Duty Enforcement Group I. Uncontested Fact ¶ 61, *NEC Corp. v. United States*, Court No. 96–10–02360 (Pretrial Order at 22, Apr. 11, 1997) (hereinafter UF ¶ ____, Pretrial Order at ____). To begin an antidumping investigation, the Deputy Assistant Secretary assigns the petition (or the task of doing a self-initiation predecisional analysis) to an Office Director who, in turn, selects Import Compliance Specialists to work on the investigation. UF ¶ 68, Pretrial Order at 26. Within each Antidumping and Countervailing Duty Enforcement Group are three AD/CVD Enforcement Offices. Mr. Gary Taverman is the Office Director responsible for the investigation team assigned the antidumping investigation of Vector Supercomputers from Japan. This team includes Mr. Edward Easton, Ms. Sunkyu Kim, and other Import Compliance Specialists, as necessary, in Mr. Taverman's Office of Antidumping and Countervailing Duty Enforcement II. UF ¶ 62, Pretrial Order at 22–23.

[15] UF ¶ 68, Pretrial Order at 26.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Investigation teams "analyze petitions submitted by manufacturers, producers, trade associations, and unions under the AD/CVD laws; conduct investigations and, for the findings, orders, or agreements under their jurisdiction, the administrative reviews required under the AD/CVD laws, including the determination of product definitions and the drafting and presentation of questionnaires, analysis of responses to questionnaires and the conduct of on site verification of the accuracy and completeness of responses; * * * [and] prepare recommendations regarding the disposition of individual AD/CVD investigations and reviews." Department of Commerce Organization and Function Order 41–1 at § 2.04b.

[20] UF ¶ 1, Pretrial Order at 7.

[21] UF ¶ 2, Pretrial Order at 7.

[22] UF ¶ 19, *Id.* at 12.

NEC's offer to supply UCAR.[23] In response to NSF's directive, UCAR commissioned Dr. Lloyd Thorndyke to prepare an analysis of NEC's offer.[24] Dr. Thorndyke's analysis concluded that NEC's offer did not involve dumping.[25]

NSF did not request Commerce to undertake a dumping analysis of the UCAR procurement.[26] Nevertheless, in contemplating a self-initiated dumping investigation, *see* 19 U.S.C. § 1673a(a)(1) (1994), Commerce undertook a preliminary analysis of NEC's bid.[27]

Specifically, on April 3, 1996, Ms. Susan Esserman, Assistant Secretary of Commerce for Import Administration, assembled a team of Import Administration officials to collect information and analyze the possibility that NEC's offer of supercomputers to UCAR might involve dumping.[28]

On April 24, 1996, Ms. Esserman convened an interagency meeting to obtain technical information on supercomputers and hear a presentation by NSF on the UCAR procurement.[29]

On May 2, 1996, Ms. Esserman became Commerce's Acting General Counsel.[30] In early May, Mr. Paul Joffe became the Acting Assistant Secretary for Import Administration.[31] On May 13, 1996, Ms. Esserman convened an interagency meeting with senior officials of NSF and other agencies to discuss the results of Commerce's preliminary analysis of NEC's UCAR bid. Attendees at the meeting included, inter alia: Ms. Esserman, Paul L. Joffe, Eleanor R. Lewis,[32] Gary Taverman,[33] John N. McPhee,[34] Mary Good,[35] Stephen J. Powell, Jr.,[36] Dr. George Cotter,[37] Dr. Neal Lane, the director of NSF, and Lawrence Rudolph, NSF's General Counsel.[38] The specifics of the May 13th meeting are discussed *infra* pp. 42–45.

On May 17, 1996, Ambassador Stuart Eizenstat, Under Secretary for International Trade, and Ms. Esserman met with Daniel K. Tarullo of

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[23] Tr. Rudolph Trial Test. at 380, Ct. Doc. #179; *see also* UF ¶ 6, Pretrial Order at 8.

[24] UF ¶ 7, Pretrial Order at 8.

[25] UF ¶ 8, *Id.*

[26] Am. Answer ¶ 28, Hr'g Exs. and Docs., Vol 2, Tab 33 at 8; Tr. Powell Trial Test. at 168, Ct. Doc. #177.

[27] Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 135, 162, 179, 185; Powell Dep., Hr'g Exs. and Docs., Vol. 4, Tab 72 at 45; *see also* Tr. Powell Trial Test. at 168, 188–192, Ct. Doc. #177.

[28] UF ¶ 13, Pretrial Order at 13; *see also* Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 177.

[29] First Esserman Decl. ¶ 9, Hr'g Exs. and Docs., Vol. 1, Tab 16 at 2–3; Commerce Admissions ¶ 16, Hr'g Exs. and Docs., Vol. 2, Tab 34 at 6–7; McPhee Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 65; Tr. Eleanor Lewis Trial Test. at 72–77, Ct. Doc. #177.

[30] UF ¶ 16, Pretrial Order at 10.

[31] UF ¶ 17, *Id.*

[32] Chief Counsel for International Commerce, Office of the General Counsel ("OGC")/DOC. *Id.*

[33] Office Director, Enforcement Group I, IA/ITA/DOC. *Id.* at 3.

[34] Director of Department's Office of Computers and Business Equipment, Trade Development ("TD")/ITA/DOC. The office is responsible for monitoring developments in the computer industry, including software and software aspects, and working with the industry and trade associations and other parts of the government to stimulate export sales. UF ¶ 12, Pretrial Order at 9. Mr. McPhee has been employed at the Commerce Department for over twenty years, and is in frequent contact with Cray on a variety of matters as part of his official duties. *Id.*

[35] Under Secretary for Technology, DOC. Def.'s Resp. to Ct. Ordered Disc., Hr'g Exs. and Docs., Vol. 2, Tab 32 at 4.

[36] Chief Counsel, IA/ITA/DOC. *Id.*

[37] Chief Scientist, National Security Agency. *Id.*

[38] UF ¶ 18, *Id.* at 11.

the National Economic Council to discuss the UCAR procurement.[39] The meeting was limited to a short factual briefing of the UCAR procurement and Import Administration's inquiry into the matter.[40]

Also on May 17, 1996, Mr. Brian Mannion, Grants and Agreements Officer of NSF, wrote to Mr. William Rawson, Vice President of UCAR,[41] and stated, *inter alia*:

> Under the Cooperative Agreement between UCAR and NSF, UCAR is required to obtain NSF's approval before UCAR enters into the agreement to acquire the supercomputing capacity that is the subject of this procurement. In purchasing this supercomputer capacity, UCAR must observe the procurement standards set forth in Office of Management and Budget Circular A–110, *Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations*, which was incorporated by reference in section 2b of clause I of the general provisions of the Cooperative Agreement. Among other things, those standards require that:
>
> > All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade.
>
> As you know, NSF has been concerned about the possibility that one or more of the proposals could give rise to the imposition of an "antidumping duty"* * *
>
> UCAR has provided NSF with several documents that addressed the "antidumping" issue. Subsequently, officials at the Department of Commerce, which has statutory responsibility for administering relevant provisions of the antidumping laws, have advised NSF that they have performed a "constructive analysis" of the proposal with the best performance characteristics. They have reached the preliminary conclusion that the proposal does not constitute an offer at "fair value."
>
> As you enter into final negotiations with the firm that in UCAR's judgment has submitted the best proposal, we remain concerned about the dumping issue. Prior to approving this award, therefore, NSF will require that UCAR has given this issue due consideration and that UCAR has obtained sufficient documentation to demonstrate that the proposal does not reflect any "noncompetitive prac-

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[39] Esserman Prelim. Inj. Test., Hr'g Exs. And Docs., Vol. 2, Tab 38 at 160; Decl. of Mary Good at 2, Under Secretary of Technology, DOC, Ct. Doc. ¶ 164.

[40] *Id.* at 161–163; *id.* at 2–3. Having received the testimony of Ms. Esserman, as well as the Declaration of Mary Good, two attendees of the May 17, 1996, meeting, the Court did not require testimony at trial by Mr. Eizenstat to establish the substance of the meeting. *See Warzon v. Drew*, 155 F.R.D. 183, 185 (E.D. Wis. 1994) (obtaining involuntary testimony of high ranking government officials requires that the "evidence must not be available through an alternative source or via less burdensome means.") The Esserman testimony and the Good declaration were sufficient alternative sources of the evidence.

[41] UF ¶ 19, Pretrial Order at 12.

tices among contractors that may restrict or eliminate competition or otherwise restrain trade" in violation of the antidumping laws.[42]

On May 20, 1996, UCAR announced that it had selected for final contract negotiations FCC's bid to supply a system of four NEC 32 processor SX–4 vector supercomputers for $35.25 million. UCAR found that the NEC systems offered by FCC "provide a distinct technical advantage compared to the systems offered by the other vendors."[43]

On May 20, 1996, Commerce transmitted to NSF a letter from Acting Assistant Secretary Joffe to Dr. Lane, Director of NSF, (the "Joffe Letter") stating that "using standard methodology prescribed by the dumping law" Commerce had "estimated" that NEC's bid to supply UCAR was below cost, and that the dumping margin on NEC's UCAR bid "is likely to be very high," and further, that UCAR's acquisition of NEC supercomputers "could have a serious adverse impact on the domestic industry's efforts to develop a more advanced version of the supercomputer system to be supplied."[44] The Joffe Letter also stated that a formal antidumping investigation could be self-initiated by Commerce or initiated pursuant to an antidumping petition.[45] The Secretary of Commerce approved the delivery of the "Joffe Letter" to NSF.[46]

On the same date, Mr. Joffe sent a second letter to Dr. Lane transmitting a document entitled "Predecisional Memorandum."[47] The Predecisional Memorandum contained a "Dumping Analysis" that included a specific, estimated "Margin Calculation" ranging from 163.38 to 280 percent.[48] The Predecisional Memorandum was not based on NEC's actual cost and pricing data that would be used to make a formal dumping finding under the statute.[49] Instead, Import Administration staff reviewed various sources of information, including estimates of NEC's costs available to the U.S. Government, the Thorndyke Study, and information from NEC financial statements.[50]

For reasons relating to NSF's procurement procedures, NSF requested authorization from Commerce to release the analysis to NEC, UCAR and NCAR.[51] Commerce transmitted the May 20 Predecisional Memorandum to NSF with authorization for NSF to distribute the Memorandum to NEC, UCAR and NCAR as within Commerce's "in-

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[42] Hr'g Exs. and Docs., Vol. 1, Tab 23.

[43] UF ¶ 10, Pretrial Order at 8 (quoting UCAR May 20, 1996, Press Release).

[44] Hr'g Exs. and Docs., Vol. 1, Tab 14.

[45] UF ¶ 23, Pretrial Order at 12–13; *see also* Hr'g Exs. and Docs., Vol. 1, Tab 14.

[46] Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 175–76.

[47] UF ¶ 24, Pretrial Order at 13; *see also* Hr'g Exs. And Docs., Vol. 1, Tab 15.

[48] Hr'g Exs. and Docs., Vol. 1, Tab 15 at 3.

[49] Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 150–51. ("we were involved with a preliminary analysis * * * when you make a preliminary, [19 U.S.C. § 1673b(b)], or a final determination, [19 U.S.C. § 1673d(a)], [there is] a full review of a foreign producer's data, * * *"). Among other things, that review includes verification of the foreign producers' data. *See* 19 U.S.C. § 1677m(i)(1) (1994); 19 C.F.R. § 353.36(a)(i) (1996).

[50] UF ¶ 26, Pretrial Order at 14.

[51] Tr. Powell Trial Test. at 178–82, Ct. Doc. #177; Tr. Rudolph Trial Test. at 384, 417–18, Ct. Doc. #179.

tended official use."[52] Commerce and NSF agreed that the disclosure of the Predecisional Memorandum to NSF, NEC, UCAR and NCAR was for purposes of the procurement.[53]

Commerce made the Joffe Letter available to the press and public and faxed it directly to Cray on May 20, 1996.[54] It was published in *Inside U.S. Trade* on May 24, 1996.[55] The Predecisional Memorandum was published in *Inside U.S. Trade* on September 13, 1996.[56] There is no evidence of *Inside U.S. Trade*'s source for publication.

On June 4, 1996, Cray executives, accompanied by outside counsel, met with Import Administration staff for pre-petition counseling.[57]

On June 5, 1996, Robert LaRussa, who had no prior involvement in the issues relating to the UCAR procurement, succeeded Mr. Joffe as Acting Assistant Secretary of Commerce for Import Administration.[58] On June 7, 1996, Mr. LaRussa was briefed by Mr. Taverman on the predecisional analysis and the dissemination and general content of the Predecisional Memorandum.[59] He also read the Joffe Letter at that time.[60] Mr. LaRussa did not read the predecisional dumping analysis.[61]

Mr. LaRussa has had no communication with Mr. Eizenstat or Ms. Esserman relating to the preparation, dissemination, purpose, or content of the Predecisional Memorandum; neither Ms. Esserman nor Mr. Eizenstat had communicated to Mr. LaRussa their views on Cray's antidumping petition; and Mr. Eizenstat gave Mr. LaRussa only general guidance to observe all standard applicable procedures in the pending investigation of vector supercomputers from Japan.[62]

On June 6, 1996, Mr. Joffe, then a Senior Advisor to the Assistant Secretary for Import Administration, Mr. Powell, and Mr. Taverman, met with Democratic staff members from the House of Representatives Science Committee to discuss the UCAR procurement. Mr. Taverman explained the predecisional analysis and the resulting estimated dumping margins.[63]

On June 10, 1996, Ms. Esserman, Mr. Joffe, Mr. LaRussa, Mr. Powell, and Mr. Taverman met with staff members of the House Ways and Means Committee and Senate Finance Committee, at the request of one of the staff members, to discuss the UCAR procurement. Mr. Taverman again explained the predecisional analysis and the estimated dumping

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[52] Joffe Transmittal Letter, Hr'g Exs. and Docs., Vol. 1, Tab 15; *see also* Tr. Powell Trial Test. at 185, Ct. Doc. #177; Tr. Rudolph Trial Test. at 400, Ct. Doc. #179.

[53] *Id.*

[54] UF ¶ 29, Pretrial Order at 14.

[55] UF ¶ 30, *Id.*; *see also* Hr'g Exs. and Docs., Vol. 2, Tab 55.

[56] Hr'g Exs. and Docs., Vol. 2, Tab 55.

[57] UF ¶ 41, Pretrial Order at 17.

[58] UF ¶ 32, Pretrial Order at 15.

[59] Suppl. LaRussa Interrog. Resp. 2, Hr'g Exs. and Docs., Vol. 2, Tab 37 at 3–4; Taverman Dep., Hr'g Exs. and Docs., Vol. 4, Tab 73 at 42–47.

[60] Suppl. LaRussa Interrog. Resp. 2, Hr'g Exs. and Docs., Vol. 2, Tab 37 at 3.

[61] *Id.*

[62] Suppl. LaRussa Interrog. Resp. 2, 3, 6, Hr'g Exs. and Docs., Vol. 2, Tab 37 at 3, 6, 11– 12.

[63] UF ¶ 33, Pretrial Order at 15. The Predecisional Memorandum was not given to the Congressional staff members.

margins.[64] Acting Assistant Secretary LaRussa did not make any presentation or ask or answer any questions at the June 10 meeting.[65]

On June 11, 1996, Ms. Esserman, Mr. Powell, Mr. Joffe, Mr. Taverman, and Mr. LaRussa met with Representative David E. Skaggs,[66] at his request, to discuss the UCAR procurement. They explained the antidumping process to Congressman Skaggs, and Mr. Taverman explained in general terms the predecisional dumping analysis.[67]

On June 20, 1996, Mr. Rawson of UCAR wrote to Mr. Mannion at the NSF to state that, in response to NSF's May 17 letter, UCAR had asked FCC/HNSX/NEC to comment upon Commerce's May 20, 1996, Predecisional Memorandum and also had retained its own legal and economic experts to evaluate the FCC/HNSX/NEC response as well as Commerce's Predecisional Memorandum.[68]

UCAR concluded, based on its information, that the FCC/HNSX/NEC offer to supply four of NEC's SX–4 32 processor supercomputers was not at less than fair value.[69]

On June 24, 1996, NSF Director Lane forwarded to the Secretary of Commerce, Michael Kantor, Mr. Rawson's letter of June 20, 1996, together with the enclosed cost analyses, asking Secretary Kantor to inform him "in the near future" about Commerce's intentions regarding the self-initiation of an antidumping investigation of supercomputers from Japan.[70] Also on June 24, 1996, NSF General Counsel Rudolph wrote to Ms. Esserman conveying the same cost analyses.[71]

On July 29, 1996, Cray filed an antidumping petition with Commerce and the U.S. International Trade Commission ("ITC") against vector supercomputers from Japan.[72]

On August 2, 1996, NEC wrote to Under Secretary Eizenstat advising him of a request to Commerce's Inspector General for an investigation of the circumstances surrounding the issuance of Commerce's Predecisional Memorandum as well as NEC's claim that Commerce had improperly released NEC's business confidential information to Cray. NEC sought suspension of the antidumping investigation initiated pursuant to Cray's petition, pending the conclusion of the Inspector General's investigation.[73]

On August 14, 1996, Mr. LaRussa received a note from Under Secretary Eizenstat transmitting a letter from NEC's counsel dated August 2,

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[64] UF ¶ 34, *Id.* The Predecisional Memorandum was not given to the Congressional staff members.

[65] UF ¶ 35, *Id.* at 16.

[66] Representative David E. Skaggs represents the 2nd Congressional District of Colorado which includes Boulder Colorado, where UCAR and NCAR are located. UF ¶ 36, *Id.*

[67] UF ¶ 37, *Id.* Subsequently, the UCAR procurement and Commerce's preliminary analysis were the subject of Congressional debate on an amendment to a House Appropriations Bill. *See* H.R. Rep. 104–628 at 124–129; 142 Cong. Rec. H6905–02 (1996).

[68] UF ¶ 38, Pretrial Order at 16.

[69] UF ¶ 39, *Id.* at 17.

[70] UF ¶ 40, *Id.*

[71] UF ¶ 42, *Id.*

[72] UF ¶ 43, *Id.*; *see also Vector Supercomputers from Japan*, 61 Fed. Reg. 43,527 (Dep't Commerce 1996) (init. antidumping invest.).

[73] UF ¶ 44, Pretrial Order at 17–18.

1996, and instructing Mr. LaRussa to draft a response to a letter from NEC's counsel containing allegations that Commerce Department actions related to its antidumping investigation "may include violations of a Federal criminal statute, applicable Department regulations, and the Due Process Clause of the Constitution."[74]

On August 19, 1996, Commerce initiated the supercomputer investigation.[75] The investigation was assigned to Import Administration's Office of Antidumping and Countervailing Duty Enforcement II.[76]

On August 20, 1996, NSF issued a press release in which Dr. Neal Lane, NSF's Director, stated, *inter alia*:

> In my view, it would be inappropriate for NSF to approve this procurement until the dumping issue has been resolved.
>
> In light of the numerous questions raised about and interest expressed in this procurement, I am pleased that the issue of dumping is being properly addressed by the appropriate federal agencies. The Department of Commerce and the International Trade Commission have the statutory authority, the expertise, and the established procedures to determine whether this offer is being made at less than fair value, and whether it would be injurious to American industry.
>
> I am acutely aware that the National Center for Atmospheric Research (NCAR), which is operated by UCAR, needs state-of-the-art computational equipment to maintain U.S. world leadership in climate modeling research. I feel, however, that acting now on this procurement would be inconsistent with the responsible stewardship of taxpayer monies.[77]

On September 12, 1996, the Chairman of the ITC notified the Secretary of Commerce that the Commission had made an affirmative determination in the preliminary injury phase of the antidumping investigation regarding vector supercomputers from Japan,[78] which was published on September 25, 1996, in the Federal Register.[79]

On September 30, 1996, Commerce sent Section A of its antidumping questionnaire to counsel for NEC.[80] The same questionnaire was sent to Fujitsu Limited ("Fujitsu").[81]

On October 15, 1996, NEC sent a letter to Secretary Kantor stating "we have today asked the Court of International Trade to enjoin the Department's continued prosecution of its antidumping investigation of supercomputers from Japan."[82] NEC explained that the reason for this action was that Commerce publicly endorsed "the merits of our competitor's dumping claim before the antidumping investigation was even ini-

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[74] *Id.*

[75] *Vector Supercomputers from Japan*, 61 Fed. Reg. 43,527 (Dep't Commerce 1996) (init. antidumping invest.)

[76] UF ¶ 46, Pretrial Order at 18.

[77] UF ¶ 48, *Id.*; *see also* Ex. Q attached to Pls.' Mem. of P& A. in Supp. of Mot. for Prelim. Inj., Court Doc. #004.

[78] UF ¶ 49, Pretrial Order at 19.

[79] UF ¶ 51, *Id.*; *see also Vector Supercomputers from Japan*, 61 Fed. Reg. 50,331 (ITC 1996) (prelim. injury determ.).

[80] UF ¶ 52, Pretrial Order at 19.

[81] *Id.*

[82] UF ¶ 53, *Id.* at 19–20.

tiated" and therefore "Commerce has deprived NEC and HNSX of the right to a fair and impartial decision-maker to which they are entitled under the Fifth Amendment of the United States Constitution. Accordingly, [NEC] will respectfully withhold their response to the Department questionnaire until such time as a qualified independent party, who is impartial and has not already prejudged the matter, is appointed as a 'special master' to conduct the investigation."[83]

As noted above, NEC filed this lawsuit on October 15, 1996 seeking to enjoin Commerce's investigation of vector supercomputers from Japan.

DISCUSSION

NEC's constitutionally based prejudgment claim (seeking disqualification of an administrative decisionmaker) invokes the protections of the Due Process Clause of the Fifth Amendment.[84] *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464 (1975)(reviewing whether combination of investigative and adjudicative functions creates an unconstitutional risk of bias in administrative adjudication). Before an administrative action implicates constitutional due process concerns, however, that action must deprive a party of "life, liberty, or property."[85] Therefore, a prejudgment claim based on the Due Process Clause requires that the court "first determine whether a protected property or liberty interest exists," before determining "what procedures are necessary to protect that interest." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 426, 795 F. Supp. 428, 435 (1992) (citing *American Ass'n of Exporters & Importers v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985).

The Supreme Court has interpreted Congress' power "to regulate Commerce with foreign nations"[86] to be "so complete * * * that no one can be said to have a vested right to carry on foreign commerce with the United States." *The Abby Dodge*, 223 U.S. 166, 176–77, 32 S. Ct. 310, 313 (1912); *see also* authorities cited in *Arjay Assocs., Inc. v. United States*, 8 Fed. Cir (T) 16, 18–20, 891 F.2d 894, 896–98 (1989);[87] and *B-West Imports, Inc. v. United States*, 880 F. Supp. 853, 863–64 (CIT 1995). NEC did not identify a specific constitutionally protected interest at stake in the

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[83] *Id.*

[84] U.S. Const. Amend. V.

[85] The Due Process Clause provides, "No person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. "The [Supreme] Court analyzes each of these three concepts separately; unless an agency action threatens to deprive an individual of something that fits within one of these three categories, the procedures used by the agency are not subject to review under the Due Process Clause." Kenneth Culp Davis & Richard J. Pierce, *Administrative Law Treatise* § 9.4 at 21 (3d ed. 1994).

[86] U.S. Const. Art I, § 8, cl. 3.

[87] *Arjay* cites the following authorities:

Buttfield v. Stranahan, 192 U.S. 470, 493, 24 S. Ct. 349, 354, 48 L. Ed. 525 (1904) ("As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution."); * * * *American Assoc. of Exporters and Importers v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985) ("No one has a protectable interest to engage in international trade."); *Ganadera Indus., S.A. v. Block*, 727 F.2d 1156, 1160 (D.C. Cir. 1984) ("[Ganadera's] due process argument must fail because [Ganadera] has no constitutionally-protected right to import into the United States."); * * *.

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pending antidumping investigation. Indeed, the authorities set forth in *Arjay* demonstrate judicial caution toward recognition of constitutionally protected interests for matters involving foreign trade or commerce. These cases from the Supreme Court and the Federal Circuit seem to preclude recognition of a constitutionally based prejudgment claim.

The absence of a constitutional claim, however, does not foreclose a statutory claim. A statute defining procedures for submission of information, 19 U.S.C. § 1677m(d) &(e), and for a hearing, 19 U.S.C. § 1677c, "command[s] by implication"[88] that the procedures and hearing be fair, *see Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 321, 53 S. Ct. 350, 360 (1933), and not a "hollow formality."[89] Prejudgment of an antidumping investigation, wherein the decisionmaker has a closed mind at initiation, would undermine the statutory procedures that Congress has prescribed. Recognition of a statutorily based prejudgment claim is therefore appropriate.[90]

The absence of a constitutional right has been recognized in relation to aspects of international trade other than exclusion from importation. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448–49, 99 S. Ct. 1813, 1821–22, 60 L.Ed.2d 336 (1979); *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 57, 53 S. Ct. 509, 509–10, 77 L. Ed. 1025 (1933) (no violation of federalism in imposition of duty on state importation) ("The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States."); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318, 53 S. Ct. 350, 359, 77 L. Ed. 796 (1933) ("No one has a legal right to the maintenance of an existing rate or duty."); *North Am. Foreign Trading Corp. v. United States*, 783 F.2d 1031, 1032 (Fed. Cir. 1986) ("No vested right to a particular classification or rate of duty or preference is acquired at the time of importation."); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 580, 63 C.C.P.A. 15 (1975); *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1217, 64 C.C.P.A. 130 (1977), *aff'd*, 437 U.S. 443, 98 S. Ct. 2441, 57 L.Ed.2d 337 (1978) ("Not without reason has Congress refrained from spelling out either the precise criteria for determining what shall constitute a bounty or grant and what shall not, or the calculations to be followed in determining net amount. As this court said in *Hammond Lead*, [*United States v. Hammond Lead Prods.*, 440 F.2d 1024, 58 C.C.P.A. 129, *cert. denied*, 404 U.S. 1005, 92 S. Ct. 565, 30 L. Ed.2d 558 (1971)]: 'In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative, or policy spheres,' 440 F.2d at 1030, 58 C.C.P.A. at 137, to which the court might well have added the eminently important economic sphere. Our nation's relationships in the world family are particularly sensitive to the assessment of the additional duties known as 'countervailing' duties. Such assessment is not just a means of protecting our producers, as Congress has recognized in refusing to require proof of injury before making such assessment; it is also one of the chips in a game played by governments on a world stage.").

Arjay, 8 Fed. Cir (T) at 18–20, 891 F.2d at 896–898

[88] *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 321, 53 S. Ct. 350, 360 (1933).

[89] *Association of National Advertisers, Inc. v. United States*, 627 F.2d 1151, 1187 (D.C. Cir. 1979)(MacKinnon, J., dissenting).

[90] The Court's recognition of a statutorily based prejudgment claim seeking disqualification of a decisionmaker in an antidumping investigation does not extend to recognition of NEC's general claim of "institutional bias" seeking disqualification of the entire Commerce Department based on an alleged bias in favor of a domestic manufacturer. Recognition of an institutional bias claim is appropriate when structural infirmities within a decisionmaking body render it biased as a matter of law. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 578–79, 93 S. Ct. 1689, 1697–98 (1973) (finding that members of the Georgia Board of Optometry who stood to gain from reduced competition resulting from license revocations could not in fairness adjudicate those revocations). Where no comparable structural bias (e.g., "potential conflict of interest or a pecuniary stake in the outcome of the litigation," *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 640 (1st Cir. 1996)(citations omitted)) exists, "an entire group of adjudicators cannot be disqualified wholesale solely on the bases of an alleged institutional bias in favor of a rule or policy promulgated by that group." *Id.* (citing *Doolin Security Savs. Bank v. FDIC*, 53 F.3d 1395, 1407 (4th Cir. 1995) and *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989)).

The *Doolin* court observed, "Presumably all agencies inherently have some level of 'institutional bias,' but such an interest does not render all agencies incapable of adjudicating disputes within their own proceedings given the strong public interest in effective, efficient, and expert decisionmaking in the administrative setting." *Doolin*, 53 F.3d at 1407. That observation is applicable to Commerce's administration of the antidumping laws. A general allegation of bias in favor of a domestic manufacturer could probably be made in all dumping investigations; this is simply a consequence of enforcing laws intended to remedy the injury caused by less than fair value imports. The fact that domestic manufacturers stand to benefit from the imposition of antidumping duty orders does not render Commerce incapable of conducting investigations.

There is no structural bias operating in Commerce's administration of the dumping laws that implicates an institutional bias claim, least of all here. Commerce's decision to alert another federal agency of a potentially unfair practice under the antidumping laws is a lawful action, *see infra* n.97, that will not support a claim of institutional bias even if characterized as manifesting a bias in favor of a domestic manufacturer. Here, fairness in the administrative proceeding is safeguarded adequately by recognition of the prejudgment claim.

By its nature, however, the claim is limited, and the burden for establishing it is heavy. Principles applicable to constitutionally based bias claims are equally applicable to the statutory claim. To begin, administrative decisionmakers enjoy a presumption of honesty and integrity which must be overcome. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1974) ("The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication * * * must overcome a presumption of honesty and integrity in those serving as adjudicators; * * *"). In evaluating NEC's claim for prejudgment, "the Court starts with the assumption that the decisionmaker, the Assistant Secretary for Import Administration, is a person of honesty and integrity—basically, that he or she does not prejudge investigations." *NEC Corp. v. United States*, Court No. 96–10–02360, at 8 (Mem. Op. and Order on Pl.'s Mot. for Prelim. Inj., Mar. 21, 1997).

A public position on a policy issue is not disqualifying; nor is prior knowledge of adjudicative facts. *See Hortonville Joint School Dist. No. 1 v. Hortonville Educational Assn.*, 426 U.S. 482, 493, 96 S. Ct. 2308, 2314 (1976) ("Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. * * * Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'")(quoting *United States v. Morgan*, 313 U.S. 409, 421, 61 S. Ct. 999, 1004 (1941)) (citations omitted).

A general claim of agency viewpoint or policy bias is not actionable. *See, e.g., FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) *(Cinderella I),* (refusing to enjoin Federal Trade Commission from conducting hearing on plaintiff's alleged unfair trade practices notwithstanding the Commission's pre-hearing issuance of a press release stating the Commission had found "reason to believe" that the law had been violated). *See also Withrow*, 421 U.S. at 58, 95 S. Ct. at 1470 ("The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation."). Thus, the Assistant Secretary's preliminary opinion on whether imports are being dumped cannot alone support disqualification. The antidumping statute contemplates that a decisionmaker will make up his or her mind over the course of the administrative process, starting from a viewpoint at the initiation of the investigation, "there may be dumping," and leading to a conclusion upon issuance of the final determination, "there is dumping," or "there is no dumping." *NEC Corp. v. United States*, 958 F. Supp. 624, 629 (CIT 1997).

As noted above, the Assistant Secretary for Import Administration is the decisionmaker for antidumping investigations. *See supra* pp. 10.

The Assistant Secretary, of course, cannot make every decision in every case.[91] The sheer volume of data, the technical nature of the issues in complex cases, and the large number of proceedings (investigations and reviews) require the Assistant Secretary to rely heavily upon the recommendations and assistance of the investigation team and other import administration[92] and Commerce Department staff.[93] Despite their influence in antidumping investigations, the independently formed opinions of Import Administration staff are not relevant to the prejudgment cause of action recognized here. Import Administration staff must communicate their recommendations to their superiors as part of their official duties; these recommendations are not final, however important they may be, and cannot lead to a showing that the mind of the Assistant Secretary for Import Administration, the decisionmaker in antidumping investigations, is closed. *See NEC Corp. v. United States*, 958 F. Supp. 624, 635–36 (CIT 1997) (citing *Corning Savings & Loan Assn. v. Federal Home Loan Bank Bd.*, 571 F. Supp. 396, 404 (E.D. Ark. 1983), *aff'd*, 736 F.2d 479 (8th Cir. 1984)).[94] For similar reasons the opinions of officials from other agencies are also not relevant to NEC's prejudgment claim. *Id.* at 635.

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[91] *See* Esserman Dep., Hr'g Exs. And Docs., Vol. 4, Tab 70 at 185.

[92] The Director for Policy and Analysis within the Office of the Assistant Secretary is the principal advisor to the Assistant Secretary on administrative and management policy for Import Administration. Department of Commerce Organization and Function Order 41–1 at § 2.03. This responsibility includes addressing disputed issues of methodology. In addition, the Director oversees the day-to-day operations of the Office of Accounting, the Office of Policy, and the Central Records Unit. *Id.* The Director of Policy and Analysis reports directly to the Assistant Secretary for Import Administration. UF ¶ 63, Pretrial Order at 23.

The Office of Accounting provides accounting/financial policy guidance in the administration of the Antidumping and Countervailing Duty laws, provides accounting and financial support for cost-accounting issues related to the cost of production and constructed value analyses, and also provides expert advice and position papers to the office of the Assistant Secretary. Department of Commerce Organization and Function Order 41–1 § at 2.03b. In this capacity, the Director of the Office of Accounting and his staff address accounting and methodological issues that can significantly impact the outcome of an antidumping case. UF ¶ 65, Pretrial Order at 24.

The Office of Policy serves as the principal staff in the formulation and implementation of policies governing the Department's administration of the Antidumping and Countervailing Duty statutes. Department of Commerce Organization and Function Order 41–1 at § 2.03a. In consultation with the Office of the Chief Counsel for Import Administration, the Office of Policy is responsible to ensure that the AD law is administered consistent with Congressional intent and is responsible to ensure the uniform application of statutory and regulatory provisions of the AD/CVD laws and regulations. *Id.* In this capacity, the Director of the Office of Policy and his staff address interpretations of the AD statute and regulations. UF ¶ 64, Pretrial Order at 23–24.

The Office of the Chief Counsel for Import Administration is charged with providing legal services to the Import Administration. In this capacity, the Chief Counsel for Import Administration and his staff address interpretations of the AD laws and regulations and renders advice on various legal decisions that may have a significant impact on the outcome of an antidumping case. Moreover, the Chief Counsel for Import Administration reports directly to the General Counsel. Department of Commerce Organization Order 10–06 at § 2.02. Within the Office of the Chief Counsel for Import Administration, there is at least one attorney and a supervising attorney assigned to each antidumping proceeding conducted by Import Administration. UF ¶ 67, Pretrial Order at 25.

[93] For example, the General Counsel "is the chief law officer of the Department, and legal advisor to the Secretary, the Under Secretaries, the Assistant Secretaries, and other officers of the Department, including operating heads." Department of Commerce Organization Order 10–6 at § 3.01. The functions of the Office of General Counsel for the Department of Commerce include "the preparation or review of pleadings, briefs, memoranda, and other legal documents necessary in proceedings involving the Department, or requested by any other Government agency for use in proceedings." Department of Commerce Organization Order 10–06 at § 4.01c. The General Counsel reports directly to the Secretary of Commerce. *Id.* at § 2.01.

[94] The opinions of career staff about an investigation are not relevant for a prejudgment cause of action, and therefore, not discoverable. Nevertheless, outcome directives from the Assistant Secretary for Import Administration to Import Administration staff prior to initiation of an investigation are potentially discoverable, assuming there is an actual risk of prejudgment present. *See, e.g., NEC Corp. v. United States*, 958 F. Supp. 624, 636 (CIT 1997) ("the Court is allowing discovery [of a staff member] solely on the question of directives he has received from superiors with respect to the outcome of the supercomputer investigation.").

Antidumping proceedings are not adjudicatory[95] but investigatory, *see* H.R. Rep. No. 96–317, at 77 (1979); S. Rep. No. 96–249, at 100 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 486. *See also Budd Co. v. United States* 1 CIT 67, 72, 507 F. Supp. 997, 1001 (1980) ("Congress has recognized that the administrative proceedings under Title VII of the Tariff Act of 1930 are investigatory, not adjudicatory."), with statutorily prescribed procedures: a final determination in which the Department must articulate and substantiate its decisionmaking, *see* 19 U.S.C. § 1677f(i)(3)(A) (1994); an opportunity to submit factual information and legal argument, *see* 19 U.S.C. § 1677m(d)–(e) (1994); 19 C.F.R. §§ 353.31(2), 353.38(2) (1996); an opportunity to argue important issues at a hearing, *see* 19 U.S.C. § 1677c (1994); 19 C.F.R. § 353.58(b) (1996); and an opportunity for judicial review of the final determination to insure Commerce's decision is supported by substantial evidence and in accordance with law. *See* 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a)(2)(B)(i), 1516a(b)(1)(B)(i).

While these procedures must not be rendered nugatory by prejudgment, at the same time, any claim of prejudgment must be circumscribed to ensure that the administrative process is not disrupted. Thus, the claim recognized by the Court precludes only conduct by the decisionmaker that will render the statutory procedures a hollow formality.

Under this statutory scheme, a plaintiff must demonstrate more than the appearance of prejudgment to disqualify a decisionmaker. A plaintiff must show from the conduct and statements of the decisionmaker[96] that the outcome of the investigation had already been determined and that plaintiff's participation in the administrative process would be futile.

In addition, the presumption of honesty and integrity operating in favor of administrative decisionmakers coupled with the considerable process Congress has codified in the antidumping statute requires clear and convincing proof for the court to conclude that the process has actually been undermined by prejudgment. *See Association of Nat'l Adver. v. FTC*, 201 U.S. App. D.C. 165, 172–84, 627 F.2d 1151, 1158–70 (1979) ("The 'clear and convincing' test is necessary to rebut the presumption of administrative regularity.").

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[95] *See* 19 U.S.C. § 1677c(b) ("The hearing shall not be subject to the provisions of subchapter II of chapter 5 of title 5 [defining administrative procedures], or to section 702 of such title."). The D.C. Circuit requires recusal of a decisionmaker in an adjudicatory administrative proceedings

> where 'a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.' *Cinderella Career and Finishing Schools, Inc., v. FTC*, 138 U.S. App. D.C. 152, 160, 425 F.2d 583, 591 (1970). In other words, we will set aside a commission member's decision not to recuse himself from his duties only where he has "demonstrably made up [his] mind about important and specific factual questions and [is] impervious to contrary evidence."

Metropolitan Council of NAACP Branches v. FCC, 310 U.S. App. D.C. 237, 247–48, 46 F.3d 1154, 1164–65 (1995) (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913, 101 S. Ct. 3148 (1981)). The constitutionally driven concerns of formal adjudicatory proceedings are not at issue in antidumping cases. *See* discussion *supra* p. 29.

The D.C. Circuit has articulated an even higher standard for establishing prejudgment in a rulemaking-like proceeding. *See Association of Nat'l Advert. v. FTC*, 201 U.S. App. D.C. 165, 172–84, 627 F.2d 1151, 1158–70 (1979) ("[A] Commissioner should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.").

[96] The focus is on the conduct and statements of the decisionmaker and not his or her mental processes to avoid a potentially unwarranted intrusion into legitimate executive department functioning. *See* cases cited *infra* n. 97.

NEC has an added burden in the present case because a new decision-maker replaced the Assistant Secretary under whose command the pre-decisional analysis and letter were prepared and disseminated. Furthermore, as noted above, *supra* 11–12, Acting Assistant Secretary Robert LaRussa has had only a cursory involvement with the matters in dispute here. NEC's burden is twofold: first, to demonstrate that Mr. LaRussa's predecessor prejudged the investigation, and second, that by virtue of that prejudgment, Mr. LaRussa's decisional independence is constrained in a way that precludes a fair investigation.

Applying the standard articulated above to the facts of this case, the risk of prejudgment arose from Import Administration's rendering advice to another federal agency prior to initiation of a formal dumping investigation.[97] The advice was first given orally by Ms. Esserman[98] at the May 13th interagency meeting with representatives from NSF, and subsequently reduced to writing at NSF's request with the result being the Joffe letter and the Predecisional Memorandum.

The Predecisional Memorandum and Joffe letter do not in and of themselves establish prejudgment. The letter is not definitive: Commerce "*estimated*" that NEC's bid to supply UCAR was below cost, and that the dumping margin on NEC's UCAR bid "is *likely* to be very high," and that UCAR's acquisition of NEC supercomputers "*could* have a serious adverse impact on the domestic industry's efforts to develop a

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[97] NEC challenges Commerce's authority to advise another federal agency about possible dumping, contending that the transmittal of the predecisional memorandum to NSF was *ultra vires*. Commerce does have the authority to undertake a predecisional dumping analysis to decide whether to self-initiate an antidumping investigation. *See* 19 U.S.C. § 1673a(a)(1); *see, e.g., Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan*, 50 Fed. Reg. 41,450 (Dep't Commerce 1985)(init. antidumping duty invest.); *Certain Softwood Lumber Products from Canada*, 56 Fed. Reg. 56,055 (Dep't Commerce 1991)(self-initiation countervailing duty invest.). Having the responsibility and expertise for administration of the antidumping laws and being the "master" of those laws, *Daewoo Elecs. Co. v. International Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993) (citing *Consumer Prods. Div., SCM Corp v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985)), Commerce here had the authority to share its analysis with another federal agency confronted with a dumping issue. NSF has no experience with the antidumping law, but it believed the dumping issue was potentially relevant given that the procurement was governed by standards that discourage "noncompetitive practices." *See supra* at pp. 12, 15–6; Commerce's transmittal of its analysis to NSF was consistent with the "general presumption that information obtained by one Federal Government agency is to be freely shared among Federal Government agencies." *Inter-Departmental Disclosure of Information Submitted Under The Shipping Act of 1984* 9 Op. OLC 48, 53 (Feb. 8, 1985).

NEC further asserts that Commerce's actions were nevertheless *ultra vires* on the ground that when the Predecisional Memorandum was prepared Commerce's real motivation was not to analyze self-initiation but to prevent the UCAR procurement of NEC supercomputers. Hence, NEC seeks to litigate, as a factual matter, Commerce's motivation for the preparation of the Joffe letter and the Predecisional Memorandum. The Court ruled at the pretrial conference that it would not decide this issue. To inquire into the motivation of an otherwise lawful activity and probe the mind of government officials would represent an unwarranted intrusion into legitimate executive department functioning. Because the Court concluded that it is lawful for the ITA to prepare a predecisional dumping analysis and share it with another federal agency confronting a dumping issue, inquiry into ITA's motivation would intrude inappropriately into an executive official's decision-making process. *See, e.g.,United States v. Morgan*, 313 U.S. 409, 422 (1941); *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1947)("'The devil himself knoweth not the mind of man,' and a modern reviewing court is not much better equipped to lay bare unexposed mental processes."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995); *Bacon v.Department of Housing and Urban Dev.*, 757 F.2d 265, 269–70 (Fed. Cir. 1985).

The Court stated at the pretrial conference that "[t]he outstanding factual question to be resolved is whether the dissemination of the predecisional analysis and accompanying explanations about its contents compromise the Department's ability to conduct the pending antidumping investigation. * * * the Court recognizes that advice had been rendered and, subsequently, the UCAR procurement was put on hold* * * the Court must determine whether the advice and the manner in which it was given would render a decisionmaker reluctant or unable to reach a result contrary to the initial advice. Thus, while [the Court] will not allow inquiry into the decisionmaker's motivations or thought process, [the Court] will allow inquiry into the practical consequences of the predecisional advice on the ultimate determination." Tr. Pre-Trial Conf. at 5–6, April 7, 1997, Ct. Doc. # 155.

[98] Although no longer the Assistant Secretary for Import Administration at the time of the meeting, Ms. Esserman remained the Department's principal spokesperson on the UCAR issue.

more advanced version of the supercomputer system to be supplied."[99] *See Cinderella I*, 404 F.2d at 1315 (addressing the issue of whether the FTC's issuance of press releases stating that the Commission had "reason to believe" that the law had been violated constituted prejudgment, the court rejected the contention that issuance of the press releases, in and of themselves, placed Commission members "under a very real pressure to vindicate themselves and justify their charges.").

The Predecisional Memorandum is not definitive either. It was based only on information available to the Department at the time it was prepared.[100] It was not based on NEC's actual sales and cost data that would be used for the preliminary and final determinations, assuming NEC participated in the investigation. With different data from completed questionnaire responses, the results of the actual investigation could be different. *See* Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol 2, Tab 38 at 2233–236.

The Predecisional Memorandum includes costs for Research and Development ("R & D") in its calculation of estimated dumping margins.[101] NEC argues that this indicates prejudgment of the critical methodological issue in the investigation.[102] The Court does not agree. In the formal investigation, NEC would be free to argue, in its case brief and at a hearing, its position on R & D expenses. *See, e.g.*, *FTC v. Cement Institute*, 333 U.S. 683, 701, 68 S. Ct. 793, 803 (1948) ("Here, * * *, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities."). The Court cannot conclude that the procedures for argument and submission of factual information on R & D expenses were rendered meaningless by the Predecisional Memorandum. If anything, their meaning was only amplified as NEC became aware of the Department's preliminary thinking on a key methodological question.

The allegation in NEC's complaint that presented an actionable claim necessitating trial was contained in paragraph 24, which stated, "Commerce representatives repeatedly stated [at interagency meetings] that the NEC supercomputers were being offered to UCAR at less than fair value."[103] Through the course of the litigation, it became apparent to the Court that the critical event in NEC's prejudgment claim was the May 13th meeting when Commerce discussed its preliminary analysis of NEC's bid with representatives from NSF, and at which the alleged

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[99] Hr'g Exs. and Docs., Vol. 1, Tab 14.

[100] The information used included U.S. Government information estimating NEC's costs, the Thorndyke Study, and information from NEC financial statements. UF ¶ 26, Pretrial Order at 14.

[101] *See* Hr'g Exs. And Docs., Vol. 1, Tab 15 at 2

[102] *See* Pls.' Post-Trial Memo. at 64–66, Ct. Doc. #187

[103] Compl. ¶ 24, Ct. Doc. #2.

statements from paragraph 24 of the Complaint would have been made. It is to the substance of the May 13th meeting that the Court now turns.

During the May 13th meeting Ms. Esserman explained the structure and operation of the antidumping statute and presented the Department's preliminary analysis of NEC's UCAR bid.[104]

Mr. McPhee, the Director of Commerce's Office of Computers and Business Equipment within the Office of Trade Development,[105] had prepared proposed "Talking Points" for the May 13th interagency meeting.[106] Mr. McPhee's draft "Talking Points" contained the following "Summary of Antidumping Findings: Based on a comparison of NEC's bid price to its estimated cost of production * * * we find that dumping is occurring at significant levels, ranging from approximately 100–300 percent."[107] Mr. McPhee's source for the percentage estimates was the Department's predecisional analysis.[108]

Ms. Esserman reviewed Mr. McPhee's "Talking Points," concluded that they were inappropriate,[109] and did not use them for her presentation at the May 13th meeting,[110] although they were in her possession.[111] At the meeting, Ms. Esserman indicated that based on the preliminary analysis the NEC bid could result in substantial dumping margins, ranging from 100–300%.[112]

In response to questions from NSF about the likely outcome of the administrative proceedings, Ms. Esserman indicated that a dumping finding and an injury determination by the ITC could be made and successfully upheld.[113]

This statement can be interpreted two ways. NEC posits that it demonstrates prejudgment of the antidumping investigation. Alternatively, it can be read as a prediction of a possible outcome. The wisdom of making such a statement can certainly be questioned, especially if issued by a superior in the presence of persons who would staff a future investigation. The risk is that the statement becomes a self-fulfilling prophecy. In this instance, however, the evidence does not support such a conclusion. The statement was preliminary and advisory. Mr. Rudolph, NSF's general counsel who attended the May 13th meeting, testified that Ms. Esserman qualified her belief in the dumping finding as "based on the

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104 Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol 2, Tab 38 at 152–53, 225–228; Tr. Eleanor Lewis Trial Test. at 117–20, Ct. Doc. #177; Tr. Powell Trial Test. at 168, 188–192, Ct. Doc. #177; Powell Dep., Hr'g Exs. and Docs., Vol. 4, Tab 72 at 10.

105 The Office of Trade Development is separate and distinct from the office of Import Administration although both offices are within the International Trade Administration. *See* U.S. Department of Commerce Organizational Chart, Hr'g Exs. and Docs., Vol. 1, Tab Z.

106 McPhee Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 79; Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol 2, Tab 38 at 39.

107 Pls.' Exs. 2 & 9, Hr'g Exs. and Docs., Vol. 1, Tabs 2 & 9.

108 McPhee Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 80–1.

109 Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol 2, Tab 38 at 42–49.

110 *Id.*; McPhee Prelim. Inj. Test., Hr'g Exs. and Docs., Vol. 2, Tab 38 at 79. *See also* Tr. Eleanor Lewis Trial Test. at 120–122, Ct. Doc. #177.

111 *See* Tr. Taverman Trial Test. at 288, Ct. Doc. #178.

112 Tr. Rudolph Trial Test. at 375; 440–42; 444–45, Ct. Doc. #179.

113 *Id.* at 375, 444–5; see also Mr. Rudolph's contemporaneous notes of the meeting and those of Mr. Correll, who was also in attendance, Pls.' Exs. 30 & 31, Hr'g Exs. and Docs., Vol. 1, Tabs 30 & 31.

preliminary analysis as understood to date."[114] Ms. Esserman's statement also was made with sensitivity to the existing data and to the forthcoming administrative process which could alter the result. Ms. Esserman testified at the preliminary injunction hearing that the procedure of an antidumping investigation, and its ultimate conclusion in a final determination, would be based on an entirely different data base that would include the foreign producer's actual data.[115] She also testified at length about the transparent procedures required in the administrative process which could alter the result.[116]

Weighing all the evidence, the Court finds that Ms. Esserman was providing advice in the nature of a forecast rather than prejudging the outcome of the investigation. Consequently, the Court cannot conclude that Ms. Esserman's statement so constrained Mr. LaRussa as to lead to a pre-determined result.

CONCLUSION

For the foregoing reasons, plaintiffs' application for a permanent injunction is denied. Judgment will be entered accordingly.

(Slip Op. 97–118)

ST. PAUL FIRE AND MARINE INSURANCE CO., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 82–08–01099

[Defendant's motion for summary judgment granted; action dismissed.]

(Decided August 21, 1997)

Sandler, Travis & Rosenberg, P.A. (Andrew M. Parish and *Edward M. Joffe)* for the plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Kenneth N. Wolf, Barbara M. Epstein* and *Amy M. Rubin)* for the defendant.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* The defendant has interposed a motion for summary judgment, dismissing this long-pending action, the background of which has already been developed and reported in this and other courts *sub nom. United States v. Int'l Citrus of Canada, Inc.*, Cr. 81–00094 (W.D.N.Y. 1982) (plea agreement), and *United States v. Blum*, 11 CIT 316, 660 F.Supp. 975 (1987), *rev'd*, 858 F.2d 1566 (Fed.Cir. 1988).

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[114] Tr. Rudolph Trial Test. at 444–45, Ct. Doc. #179.

[115] Esserman Prelim. Inj. Test., Hr'g Exs. and Docs., Vol 2, Tab 38 at 235–237.

[116] *Id.* at 235–6.

I

As determined in those actions, one Joseph Blum, president and controlling officer of International Citrus of Canada, Inc. ("ICC"), caused shipments of orange-juice concentrate to be entered duty free as "U.S. goods returned" under item 800.00 of the Tariff Schedules of the United States ("TSUS"). However, the U.S. Customs Service came to conclude that those entries were not entitled to such benefit since the concentrate had been commingled with juice from Brazil in Florida for export to Canada, which resulted in drawback prior to return to this country. A multi-count criminal indictment was thereafter filed against ICC and Mr. Blum in the U.S. District Court for the Western District of New York, which ultimately accepted a plea of guilty to some of the charges. *See* 11 CIT at 316–17, 660 F.Supp. at 976.

Having recovered a fine on those counts, the government sought civil penalties and a duty of 35 cents per gallon via its complaint in the latter matter, which had been brought pursuant to 19 U.S.C. §1592 and 28 U.S.C. §1582 against Mr. Blum and also against E.C. McAfee & Co., an importer of record, and St. Paul Fire and Marine Insurance Company, as surety, for the unpaid duties. Upon the government's appeal from this court's dismissal of its complaint as against those two "innocent" companies, the Federal Circuit reversed, holding that 19 U.S.C. §1592(d)

> provides the United States with a cause of action to recover duties from those parties traditionally liable for [them], *e.g.*, the importer of record and its surety.

858 F.2d at 1570.

The amended complaint filed herein by the surety St. Paul prays for judgment declaring, among other things, that the merchandise was in fact classifiable under either TSUS item 800.00 or item 804.20 and that it had no obligations under any bond for any of the entries involved and therefore that the duties paid[1] should be refunded. This relief is premised upon two alleged causes of action to the effect that item 800.00 did apply. A third count of plaintiff's amended complaint pleads in the alternative that the merchandise was entitled to duty-reduced entry pursuant to TSUS item 804.20, while another avers that by allowing

> duty-free entry, the Defendant breached its contractual obligations with the surety to determine at the time of entry whether the importer's merchandise qualified for [such] treatment * * * and whether the importer was otherwise satisfying all other legal requirements for entry.[2]

A

In conformity with CIT Rule 56(i), the defendant presents with its motion for summary judgment a concise statement of material facts as to which it contends there is no genuine issue to be tried. They are sim-

[1] Following the decision by the court of appeals in the action brought pursuant to section 1592, this court afforded the parties time for discovery, which led to a stipulated conclusion of that matter against defendant St. Paul *et al.*

[2] Amended Complaint, para. 46. The plaintiff has abandoned its final, fifth alleged cause of action, sounding in collateral estoppel.

ply stated to be that (1) neither the importer nor any other person filed the documents required by Customs regulation to establish entitlement to free entry under the TSUS; (2) the Service did not waive their filing; and (3) the bond and the rider executed by the plaintiff and delivered to Customs speak for themselves. This statement is accompanied by an affidavit of a Service import specialist at the port of Buffalo, New York, detailing his knowledge of the entries in question and confirming lack of receipt of the documentation required at the time by 19 C.F.R. §10.1.

In its papers in response, the plaintiff does not deny defendant's nonreceipt, but it does submit a statement regarding investigation of ICC by Customs before the entries occurred. And the statement, as well as a supporting affidavit, also represent:

> 19. The practice in the port of Buffalo since the early 1960s concerning documents for duty free treatment and missing documents in general differs from other ports. In Buffalo, a missing document bond is never required at the time of entry. If the Customs Service later wants a document such as a 3311, a * * * Document Request Form [ ] is sent to the broker, and the missing document bond is required at that time. * * *
>
> 20. For the International Citrus entries, Customs never required that a form 3311 be filed at the time of the filing of the entry papers. At no time after entry did Customs ever send a Document Request Form to the broker or importer of record concerning these entries. Finally, at no time after entry did the Customs Service ever demand that 3311s be filed for the entries involved here. * * *[3]

Moreover, the plaintiff attempted discovery via production of documents, written interrogatories and depositions, which the court has stayed upon defendant's motion therefor, pending determination of the motion at bar for summary judgment.

Of course, such a motion can only be granted if the papers filed show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CIT Rule 56(d). *Cf. Washington Int'l Ins. Co. v. United States*, 18 CIT 654 (1994), *aff'd*, 60 F.3d 843 (Fed. Cir. 1995); *Nobelpharma U.S.A. Inc. v. United States*, 21 CIT ____, 955 F.Supp. 1491 (1997). While the "evidence must be viewed in a light most favorable to the nonmovant and all reasonable inferences must be drawn in the nonmovant's favor"[4],

> a nonmovant must do more than merely raise some doubt as to the existence of a fact; evidence must be forth-coming from the nonmovant which would be sufficient to require submission to the jury of the dispute over the fact.

Avia Group Int'l, Inc. v. L.A. Gear Calif., Inc., 853 F.2d 1557, 1560 (Fed.Cir. 1988). *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986);

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[3] St. Paul's Statement of Material Facts in Issue, pp. 6–7. *See* Affidavit of Erstin Clark McAfee, paras. 2, 3.

[4] *Avia Group Int'l, Inc. v. L.A. Gear Calif., Inc.*, 853 F.2d 1557, 1560 (Fed.Cir. 1988), citing *United States v. Diebold*, 369 U.S. 654, 655 (1962); *Interpart Corp. v. Italia*, 777 F.2d 678, 681 (Fed.Cir. 1985); *Petersen Mfg. Co. v. Central Purchasing, Inc.*, 740 F.2d 1541, 1546 (Fed.Cir. 1984).

Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986).

This has not occurred herein, which the court concludes is the result of the dispositive issues' being essentially legal in nature, as discussed hereinafter. That is, this action can be decided by way of summary judgment.

II

Jurisdiction to grant such relief is predicated upon 28 U.S.C. §§ 1581(a), 2631(a) and 2643(c)(1).

A

Plaintiff's amended complaint shows that Customs classified the imported merchandise under item 165.35, TSUS ("Fruit juices, including mixed fruit juices, * * * whether or not sweetened: * * * Citrus fruit: * * * Other: * * * Concentrated * * * 35¢ per gal."). The alternative classfication prayed for in counts I and II, per item 800.00, is as follows:

> Products of the United States when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad * * * Free[.]

The amended complaint avers that juice at issue herein satisfied the requirements of this section.

Even if true, however, this allegation does not indicate relief for the plaintiff, which does not show compliance with the procedures established by the Service for such treatment. They were set forth at length in part 10 of Title 19, C.F.R., primarily in section 10.1 thereof, including:

> **Domestic products; requirements on entry.**
>
> (a) Except as otherwise provided for in this part, the following documents shall be filed in connection with the entry of articles claimed to be free of duty under item 800.00 * * *, T[SUS]:
>
> (1) A declaration by the foreign shipper * * * if the value of the returned articles exceeds $1,000 * * * that * * * the articles * * * specified are products of the United States; that they were exported from the United States, from the port of _____ on or about _____, 19__; that they are returned without having been advanced in value or improved in condition by any process of manufacture or other means.
>
> * * * * * * *
>
> (2) A declaration for free entry by the owner, importer, consignee, or agent on the top portion of Customs Form 3311.
>
> (3) A Certificate of Exportation on the bottom portion of Customs Form 3311 executed by the district director at the port from which the merchandise was exported. Such certificate shall show whether drawback was claimed or paid on the merchandise covered by the certificate and, if any was paid, the amount thereof. This certificate shall be issued on application of the importer, or of the district director at the importer's request, and shall be mailed by the issuing officer directly to the

> port at which it is to be used. If the merchandise has been exported from the port at which entry is made and the fact of exportation appears on the records of the customhouse, the fact of re-importation shall be noted on such export record. In such case the filing of the certificate on Customs Form 3311 shall not be required.
>
> (b) If, in any case where the appraising officer's report does not show definitely that merchandise the value of which exceeds $1,000 is of domestic origin, Customs Form 3311 has not been executed by the owner or ultimate consignee, the district director may require the execution of such form by the owner or ultimate consignee. In such a case Customs From 3311 shall be filed within 3 months after the date of the demand therefor upon the person in whose name the entry was filed. * * * In the case of articles which are unquestionably the products of the United States and which have not been advanced in value or improved in condition, if the district director is satisfied from the character thereof or otherwise that they are free of duty under Schedule 8, Part I, T[SUS], and if the total value of the articles of American origin contained in the shipment does not exceed $250, the execution of Customs Form 3311 shall not be required therefor * * *.
>
> * * * * * * *
>
> (d) If the district director is reasonably satisfied, because of the nature of the articles, or production or other evidence, that the articles are imported in circumstances meeting the requirements of item 800.00 * * * and the related headnotes, he may waive the requirements for producing the documents specified in paragraphs (a) and (b) of this section * * *.

The burden of compliance with these terms and conditions rests, and always has rested, on the importer, not Customs. And the courts have not held otherwise. *See, e.g., Southern Air Transport, Inc. v. United States*, 84 Cust.Ct. 7, 10, C.D. 4836 (1980); *McDonnell Douglas Corp. v. United States*, 75 Cust.Ct. 6, 14, C.D. 4604 (1975). The plaintiff claims that a declaration by the foreign shipper was filed for each of the entries and that a Certificate of Exportation was not required. Plaintiff's Brief, p. 10. It also reiterates that

> Customs never required that a form 3311 be filed at the time of the filing of the entry papers. At no time after entry did Customs ever reject any of these entries for not conforming to the regulations or for any other reason. Moreover, at no time after entry did the * * * Service ever demand or require CF 3311s for these entries.

Id. at 7.

These contentions draw upon an affidavit provided by the president of E.C. McAfee & Co., as ICC's customs broker. On its part, the defendant has submitted a lengthy affidavit, sworn to by the Service's import specialist responsible for the Buffalo entries at issue. Among other things, he attests that the documentation submitted by McAfee "did not satisfactorily fulfill the requirements of 19 CFR 10.1 and, thus, was not considered adequate support of the claim that [the] orange juice was of U.S.

origin."[5]; that he thereupon sent a Request for Information, Customs Form 28 ("CF 28")[6] to the importer(s), asking for "specific documentation to substantiate the claim that the merchandise entered * * * was of U.S. origin, in accordance with 19 CFR 10.1"[7], and warning that "failure to furnish a completed response could result in [ ] notification that the [ ] entries, as well as future entries, would be classified under item 165.35"[8]; that the information requested by the CF 28 was not provided[9] and that the information which had been supplied did not meet the requirements of the above regulation[10]; that no such information has been provided in connection with St. Paul's protest herein[11]; and that since denial of that protest

> none of the documents required by 19 CFR §10.1 has been submitted by I[CC] or any other person. Had any further information been submitted to the port of Buffalo regarding the orange juice entries in question, from the dates of entry to the present, such information would have been sent directly to me or, if sent to anyone else at the port, would have been brought to my attention by the individual receiving it.[12]

Given such failure to satisfy the mandatory administrative conditions precedent, plaintiff's attempted reliance on the proposition that subsequent discovery during the judicial process could be a substitute[13] is of no moment. As the court in *Air-Sea Brokers, Inc. v. United States*, 80 Cust.Ct. 102, C.D. 4742, 454 F.Supp. 451 (1978), *aff'd*, 596 F.2d 1008, C.A.D. 1222 (CCPA 1979), for example, has held:

> Compliance with section 10.1(a) is mandatory and a condition precedent to recovery unless compliance has been waived or is impossible. * * * The basis for waiver of the required documentation is predicated on the district director being satisfied by the production of other evidence as to the American origin of the merchandise and its eligibility under TSUS item 800.00. If the district director is not satisfied, he cannot waive the documentation requirements of the regulations.

80 Cust.Ct. at 108, 454 F.Supp. at 456 (citations omitted). And the responsible Customs officer attests in this regard:

> At no point did the * * * [S]ervice waive production of the documents required to be filed by 19 CFR 10.1 in support of the claim that the merchandise in question was of U.S. origin. Had anyone on

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[5] Affidavit of David G. Hise, para. 6.

[6] *See id.*, para. 7 and Exhibit 2.

[7] *Id.*, para. 7.

[8] *Id. See id.*, Exhibit 2, first page.

[9] *Id.*, para. 10.

[10] *Id.*, para. 14. *Cf. id.*, paras. 6, 8, 9, 11–13 and Exhibits 1, 3, 5 and 6 in regard thereto.

[11] *See id.*, para. 15.

[12] *Id.*, para. 16.

[13] *Cf.* Plaintiff's Reply in Opposition to the Government's Supplemental Brief [hereinafter cited as "Plaintiff's Reply"], pp. 1–3.

> my team or anyone else at the port of Buffalo waived such production, I would have been aware of it.[14]

The first two counts of plaintiff's amended complaint are based upon the premise that Customs denied duty-free entry because the juice had been exported with the benefit of drawback pursuant to 19 U.S.C. §1313. *See* Amended Complaint, paras. 19, 28. The plaintiff in Count I denies any receipt of drawback, while an averment in the second count is to the effect that the "Service paid drawback to Citrus World in connection with certain of its exportations of fruit juice concentrate"[15], but that

> such payment * * * was not accomplished in connection with the imported merchandise which is the subject of the instant complaint.

Id., para. 31. Count III takes the opposite tack, to wit, "the subject merchandise was previously exported from the United States with the benefit of drawback"[16], in praying for classification under item 804.20, TSUS. The parties agree that this section entitled importers to a one percent reduction of the duty on merchandise previously exported from the United States with the benefit of drawback if it was the product of this country returned without having been advanced in value or improved in condition by any process of manufacture or other means while abroad. *Compare id.*, para. 38 *with* defendant's Answer, para. 38. The defendant does not agree, however, that the plaintiff is entitled to this relief. Rather, it points out that, in order to be classifiable under item 804.20, the merchandise had to have been such as would qualify for duty-free treatment under item 800.00 but for the operation of Headnote 1 to TSUS Schedule 8, Part 1, Subpart A.[17] It thus argues that, since failure to satisfy the requirements of 19 C.F.R. §10.1, *supra*, was the reason for lack of qualification under item 800.00, not this headnote, the merchandise "is not provided for under item 804.20, TSUS." Defendant's Brief, p. 14. The court concurs, there being no attempt by the plaintiff to point to any other possible predicate.

Hence, to summarize the foregoing discussion, the court concludes that none of plaintiff's first three pleaded causes of action states a claim upon which relief can be granted.

III

To quote further from its fourth alleged cause of action, the plaintiff claims that Customs

> breached its contract by repeatedly permitting the subject merchandise to be imported duty-free despite its knowledge that the goods did not qualify for this preferred treatment. * * *

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[14] Affidavit of David G. Hise, para. 17. The court notes in passing that the papers at bar do not indicate valuation of the entries at less than $1,000, thereby implicating 19 C.F.R. §10.1(b), *supra*.

[15] Amended Complaint, para. 30. The defendant originally pleaded lack of information in response to this allegation. It now moves to amend its answer to admit the averment, which motion is hereby granted.

[16] Amended Complaint, para. 39.

[17] This headnote, in part, precluded classification under item 800.00 of any article exported with the benefit of drawback.

> 47. As a direct result of these breaches, Plaintiff is not liable under any of the bonds for any duties or other exactions, penalties, taxes and/or damages. Moreover, Plaintiff is entitled to a refund of any and all duties previously paid in connection with the importation involved here.

Amended Complaint, paras. 46, 47. It posits two theories in support of its position.

A

The first is that the Service's standing as a third-party beneficiary of the bond has been undermined by the importer's criminal and/or fraudulent activity. That is, any

> defense arising in connection with the formation of that contract, such as fraud in the inducement or lack of mutual assent, is available to the promisor against the beneficiary.

Plaintiff's Reply, p. 5. The plaintiff claims that "Customs personnel believed as early as May 22, 1980 that the entries * * * were fully dutiable" based upon ICC's being "involved in a systemic and long-standing fraud." *Id.* at 6. It quotes from section 124(1) of the *Restatement (First) of Law of Security* that where

> before the surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, and the creditor also has reason to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety.

The plaintiff thus argues that, when the Service determined that it could not or would not disclose what it knew about ICC, it was "not entitled to accept the obligation of the surety." *Restatement (First) of Law of Security* §124 *Comment d* (1941). *See also Restatement (Third) of Law Suretyship & Guaranty* §§ 12, 47 (1995).

The defendant takes the position that the circumstances herein do not warrant recovery by the surety. And the court concludes that this position is well-founded. To begin with, the bond itself does not provide for nonpayment of duties if the importer fails to pay due to misconduct or otherwise. Secondly, while it has been held that a creditor "who, during negotiations, actively and fraudulently conceals pertinent facts cannot then turn to the surety for reimbursement"[18], this is not indicated herein. As the Supreme Court has long held, a surety which desires information must ask for it, for the creditor "is not bound to volunteer it." *Magee v. Manhattan Life Ins. Co.*, 92 U.S. 93, 99 (1875). There is no showing that St. Paul made any such request, or that Customs was possessed of anything more than suspicion prior to the entries herein and enforcement steps it thereupon took. To the extent the Service had actu-

[18] *St. Paul Fire & Marine Ins. Co. v. Community Credit Corp.*, 646 F.2d 1064, 1073 (5th Cir. 1981).

al knowledge beforehand, the court concludes that it would have been developed within the purview of ongoing law-enforcement investigation and therefore not required to be disclosed. *Cf.* 5 U.S.C. §552(b),(c); 19 C.F.R. §103.13 (1980). Indeed, disclosure of any such knowledge by Customs could have run afoul of the criminal code. *See* 18 U.S.C. §1905. In sum, the defendant was not obligated to disclose to the plaintiff what it knew. As the Court in *Magee* opined, a surety

> must not rest supine, close his eyes, and fail to seek important information within his reach. If he does this, and a loss occurs, he cannot, in the absence of fraud on the part of the creditor, set up as a defence facts first learned which he ought to have known and considered before entering into the contract.

92 U.S. at 98. *Cf. St. Paul Fire & Marine Ins. Co. v. United States*, 16 CIT 984, 807 F.Supp. 792 (1992).

B

The plaintiff also claims that the Service breached express statutory and regulatory conditions of the bond by failing to (1) have the importer deposit estimated duties sufficient to cover its entries pursuant to 19 U.S.C. §1505(a) and 19 C.F.R. §141.103 or, alternatively, (2) obtain at the time of entry Form 3311s or require the posting of a missing document bond.[19] In support of its claim that St. Paul's bond is statutory, the plaintiff relies on *Old Republic Ins. Co. v. United States*, 10 CIT 589, 645 F.Supp. 943 (1986), which in turn referred to *United States v. DeVisser*, 10 F. 642, 648 (S.D.N.Y. 1882), wherein the court had pointed out that a bond

> must be interpreted in reference to the statutes and regulations in force * * *; and insofar as any * * * are found to modify the ordinary rights of suretyship in a bond * * *, they are controlling * * * in this sense, and to this extent, statutes and regulations which are designed to affect the rights of parties to the contract must be regarded as parts of the contract.

In holding sections 113.44(a) and 159.12(b) of Title 19, C.F.R., relating to extension of time and notice thereof, to be parts of the bond therein, the opinion in *Old Republic* reiterated that a court must inquire whether such provisions of law create any obigation of the government to the surety or whether they are merely directory. 10 CIT at 600, 645 F.Supp. at 953, citing *DeVisser*, 10 F. at 647. Here, the plaintiff takes the position that the requirements of law breached by the importer, as spelled out above, were for its benefit.

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[19] Plaintiff's Reply, p. 11. St. Paul's Rider R to Immediate Delivery and Consumption Entry Bond not only required the principal to "deposit the duties and taxes * * * estimated to be due thereon" in accordance with 19 U.S.C. §1505(a) but also to

> file with the appropriate customs officer the documentation required by law to enable [him] to (1) determine whether the merchandise may be released from customs custody, (2) properly assess duties on the merchandise, (3) collect accurate statistics with respect to the merchandise, and (4) determine whether any other applicable lawful requirements are met * * *.

Defendant's Exhibit A, pp. 1–2.

On its part, the defendant is of the view that, to

> the extent that the bond in issue may be considered a "statutory bond," required by and created pursuant to the provisions of 19 U.S.C. §§66 and 1623, and of 19 C.F.R. §§113.14(g)(2), 142.4(a)(2) and 142.5, those provisions may be "read into the bond."[ ] However, nothing alleged by plaintiff may be considered a breach of the statutory provisions read into the bond.

Defendant's Brief, p. 29 (footnote ommitted). The defendant refers to *Washington Int'l Ins. Co. v. United States*, 16 Cl.Ct. 663, *aff'd*, 889 F.2d 1101 (Fed.Cir. 1989), in which the surety sued the government for refund of monies paid and for liquidated damages with regard to single entry bonds issued to the importer. The Claims Court held that the surety had "neither subrogation rights against * * * nor privity with Customs." 16 Cl.Ct. at 669–70. Even if privity were assumed, the court concluded that the plaintiff failed to state a claim since the bonds never expressly incorporated the pertinent Customs regulations. *Id.* at 669, citing *Nutt v. United States*, 12 Cl.Ct. 345 (1987), *aff'd sub nom. Smithson v. United States*, 847 F.2d 791 (Fed Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

In a subsequent case, *Ransom v. United States*, 17 Cl.Ct. 263 (1989), *aff'd*, 900 F.2d 242 (Fed.Cir. 1990), the plaintiffs sued the government upon a performance and payment bond, seeking the recovery of improper progress payments to a prior contractor. They alleged that the defendant's failure to notify them of the payments was a breach of contractual duty. The Claims Court disagreed, opining that

> the creditor is generally not required to voluntarily communicate to the surety matters concerning the financial responsibility of the principal, unless the surety makes specific inquiry regarding the point.

17 Cl.Ct at 270. The Federal Circuit in its affirmance quoted *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1160 (Fed.Cir. 1985):

> > In contrast to a subcontractor, which has no obligations running to or directly from the Government * * * a surety, as bondholder, is as much a party to the Government contract as the contractor. If the *surety* fails to perform, the Government can sue it on the bonds.
>
> * * * Nevertheless, *Balboa* did not hold a surety has contractual rights against the government just because the government has contracted with the principal of the suretyship * * *.

900 F.2d at 245 (emphasis in original). *See Fireman's Fund Ins. Co. v. United States*, 909 F.2d 495, 499 (Fed.Cir. 1990)("By definition and agreement the surety protects the government's interests, not the other way around").

Be that as it may, the court of appeals in *Ransom* did state that in *Balboa* it

> carefully qualified its statements about surety's rights in relation to government contracts. We stated that "it is conceivable that *un-*

> *der certain circumstances* a surety could assert rights against the Government" based on contract theory. * * * 775 F.2d at 1160 (emphasis added). Although the government *could* be contractually bound to a surety if it manifested such an intent, as alluded to in *Balboa*, that did not occur in this case and Ransom has not cited any act or statement as doing so.

900 F.2d at 245 (emphasis in original). The same is true herein. Indeed, a surety contract is negotiated with and signed by the principal and only then presented to the government at the time of entry. The principal agrees to pay Customs duties owed and, if it fails to do so, the surety is committed to remit them and become subrogated to any claims of the principal. In consideration for that, the principal agrees to pay the surety to undertake the risk of having to satisfy the Service if and when the principal does not. The government has to allow entry of the merchandise upon presentation of the bond, which serves to protect its interests and not those of the surety. In short, acceptance of the bond by Customs did not accord St. Paul assertable rights in this action. *See Washington Int'l Ins. Co. v. United States*, 18 CIT 654, 660–61 (1994), *aff'd*, 60 F.3d 843 (1995).

IV

In view of the foregoing, defendant's motion for summary judgment must be granted and this action dismissed.

(Slip Op. 97–119)

RHEEM METALURGICA S/A, FORMERLY RHEEM EMPREENDIMENTOS INDUSTRIAIS E COMERCIAIS S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–06–00380

Defendant moves this Court, pursuant to U.S. CIT R. 59(e) and 60(a) and (b), to amend the Judgment Order issued previously in this matter to include a provision for the payment of interest as provided for in 19 U.S.C. § 1505(c) (1988). Plaintiff opposes defendant's motion and moves to vacate the Judgment Order and, alternatively, argues interest should be awarded pursuant to 19 U.S.C. § 1677g (1988).

Held: Because the Court finds neither the statutory provision advanced by the defendant nor the provision advanced by the plaintiff is applicable to the facts of this matter, plaintiff's and defendant's Motions to Amend the Judgment Order to provide for the payment of interest are denied. Additionally, the Court denies plaintiff's Motion to Vacate the Judgment Order issued previously in this matter.

(Dated August 22, 1997)

David P. Schulingkamp, New Orleans, LA, for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States, *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(James A. Curley); Edward N. Maurer,* Office of the Assistant Chief Counsel, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* Defendant moves this Court pursuant to U.S. CIT R. 59(e) and 60(a) and (b) to amend the Judgment Order issued in *Rheem Metalurgica S/A, formerly Rheem Empreendimentos Industriais E Commerciais S.A. v. United States*, 951 F. Supp. 241 (CIT 1996) *("Rheem")* to include interest, pursuant to 19 U.S.C. § 1505(c) (1988), from a date beginning fifteen days after each of the nine entries at issue was deemed liquidated by operation of law until the date plaintiff is notified of the amount of duties, if any, that are due. Alternatively, defendant moves this Court to exercise its equitable powers to amend the Judgment Order to include prejudgment interest from October 29, 1993, the date the defendant filed its counterclaim in this matter.

Plaintiff opposes defendant's motion, and moves this Court to withdraw the Judgment Order entered in *Rheem*. In the alternative, plaintiff argues 19 U.S.C. § 1677g (1988) is the statutory provision this Court should examine in determining whether the defendant is entitled to receive interest in connection with this Court's Judgment Order.

DISCUSSION

Initially, the Court notes it has jurisdiction to decide the government's motion, which was filed on January 17, 1997, despite the fact plaintiff has filed an appeal on this matter with the United States Court of Appeals for the Federal Circuit. *See Rheem Metalurgica S/A, formerly Rheem Empreendimentos Industriais E Commerciais S.A. v. United States*, 951 F. Supp. 241 (CIT 1996), *appeal docketed*, No. 97–1256 (Fed. Cir. Mar. 6, 1997). Fed.R.App.P. 4(a) provides

> (4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:
>
> * * * * * * *
>
> (C) to alter or amend the judgment under Rule 59.

Fed.R.App.P. 4(a). In construing Fed.R.App.P. 4(a), the United States Supreme Court noted the filing of a motion under Fed.R.Civ.P. 59 "render[s] the underlying judgment nonfinal both when filed before an appeal is taken (thus tolling the time for taking an appeal), and when filed after the notice of appeal (thus divesting the appellate court of jurisdiction)." *Stone v. I.N.S.*, 514 U.S. 386, 402–03, 115 S.Ct. 1537, 1548, 131 L.Ed.2d 465 (1995). *See also Osterneck v. Ernst & Whinney*, 489 U.S. 169, 177–79, 109 S.Ct. 987, 990–92, 103 L.Ed.2d 146 (1989) (timely motion for prejudgment interest under Rule 59(e) suspends finality of judgment and renders null any notice of appeal filed before its resolution); *cf. Acosta v. Louisiana Dep't of Health and Human Resources*, 478 U.S. 251, 254, 106 S.Ct. 2876, 2878, 92 L.Ed.2d 192 (1986) (Fed.R.App.P. 4(a) interpreted "as establishing the rule that a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59 motion or any of the other motions to which the subdivision applies"). Based on this author-

ity, the Court determines it has jurisdiction to decide defendant's motion made pursuant to U.S. CIT R. 59(e) to amend this Court's Judgment Order to include interest.

In evaluating the alternative statutory provisions advanced by the parties, the Court concludes it would be inappropriate to amend the Judgment Order to include interest because neither the provision advanced by the government nor the provision advanced by plaintiff addresses the precise circumstances of the situation at issue in this matter. The statutory provision advanced by the defendant provides

> **(c) Duties due upon liquidation or reliquidation; delinquency; interest**
>
> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

19 U.S.C. § 1505(c) (1988).

In analyzing whether 19 U.S.C. § 1505(c) is applicable in this matter, the Court makes several observations. The plain language of 19 U.S.C. § 1505(c) entitles the government to interest if the goods at issue are liquidated or reliquidated and the assessed duties are not paid within thirty days of liquidation or reliquidation. That situation has not occurred with respect to either Customs' liquidations of the nine entries at issue in 1989 or the liquidation of the nine entries by operation of law on the fourth anniversary of their entry into the United States.

First, as the Court noted in *Rheem*, the Customs Service liquidated the nine entries at issue in 1989. *See Rheem*, 951 F. Supp. at 244. Indeed, the parties do not dispute the entries in issue were liquidated by the Customs Service in 1989. (*See* Def.'s Resp. to Pl.'s Stmt. of Mater. Facts not in Dispute at 3 (stating the entries were "liquidated after the[ ] fourth anniversary [of their entry into the United States]").) Following the denial of its protest, plaintiff paid the duties assessed by the Customs Service and any interest due. This payment was required before the Court could exercise its jurisdiction in this matter over plaintiff's challenge of Customs' denial of its protest. *See* 28 U.S.C. § 2637(a) (1988) ("A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced * * *."). The parties do not dispute the plaintiff has paid those duties assessed and any interest due in connection with Customs' liquidation of the entries at issue in 1989. *See* Compl. ¶ 4 ("Plaintiff has paid all liquidated duties in the manner and within the time required by law."); Answer ¶ 4 ("Admits."). Because plaintiff has paid the duties assessed and any interest that was due following Customs' 1989 liquidation of the entries at issue, the Court determines the defen-

dant is not entitled to interest pursuant to 19 U.S.C. § 1505(c) in connection with Customs' liquidation of the entries in 1989.

Additionally, 19 U.S.C. § 1505(c) is implicated by this Court's holding that the nine entries became liquidated by operation of law on the fourth anniversary of their entry into the United States. *See Rheem*, 951 F. Supp. at 251 (holding preliminary injunction entered by this Court did not suspend liquidation of the nine entries at issue, and therefore those entries became liquidated by operation of law on the fourth anniversary of their entry into the United States). In order to effectuate the determination the nine entries at issue became liquidated by operation of law, this Court ordered Customs to reliquidate the entries at a rate equal to the duties declared by the importer on the entry documents submitted to the Customs Service when the goods entered into the United States. *See id.* at 252. Through reliquidation of the entries, the duties which were due when the nine entries at issue became liquidated by operation of law will be collected and Customs' 1989 liquidation will be superceded and nullified.

While 19 U.S.C. § 1505(c) entitles the government to interest when merchandise is reliquidated and the assessed duties are not paid within thirty days of reliquidation, that situation is not present in this matter because the reliquidation has yet to occur. While the government may be entitled to receive interest pursuant to 19 U.S.C. § 1505(c) at some future date following Customs' reliquidation of the nine entries at issue, in order for that to occur, the nine entries at issue must be reliquidated and thirty days must pass without the plaintiff paying the duties assessed at reliquidation. Because those facts have not occurred in this matter, defendant is not entitled to receive interest pursuant to 19 U.S.C. § 1505(c).

In the alternative, the government requests this Court exercise its equitable powers and award the government prejudgment interest from October 29, 1993, the date the government filed its counterclaim in this matter. *(See* Def.'s Mot. to Amend J. Order at 3 (citing *United States v. Imperial Food Imports*, 834 F.2d 1013, 1016 (Fed. Cir. 1987) ("[I]t is well established that in cases such as this in which no statute specifically authorizes an award of prejudgment interest, such an award lies within the discretion of the court as part of its equitable powers.") (further citations omitted)).) The Court declines to exercise its equitable powers in this matter because neither party was aware the entries became liquidated by operation of law prior to Customs' attempted liquidation in 1989. Because plaintiff paid the assessed duties following Customs' then apparently proper liquidation of the entries in 1989, the Court does not believe it would be equitable to assess prejudgment interest against plaintiff.

In response to the government's motion for interest penalties, plaintiff contends the Court should withdraw its Judgment Order. The Court does not find the arguments made in plaintiff's motion papers persuasive. The Court remains convinced that the plaintiff had notice of the

preliminary and final determinations in Commerce's countervailing duty investigation, and in listing the countervailing duty investigation number on the entry documents and posting bonds at rates determined by the preliminary and final determinations to cover potential liability for countervailing duties plaintiff "asserted" those duties at the time of entry. When the nine entries were liquidated by operation of law pursuant to 19 U.S.C. § 1504(d), they were liquidated at an amount which included both regular duties paid by the plaintiff at the time of entry and countervailing duties asserted by the plaintiff at the time of entry. While it conceivably could be argued that by posting bonds at rates determined by the preliminary and final countervailing duty investigations plaintiff was merely acknowledging a potential and at the time indeterminate liability for countervailing duties,[1] the Court found plaintiff's actions constituted an assertion which subjected plaintiff to liability for countervailing duties when the entries became liquidated by operation of law pursuant to 19 U.S.C. § 1504(d). Because the Court continues to believe its reasoning and analysis in *Rheem* are sound, it declines to withdraw the Judgment Order entered in *Rheem*.

The Court will, however, address plaintiff's alternative argument contending any interest awarded to the defendant should be made pursuant to 19 U.S.C. § 1677g(a). The statute provides

> Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—
>
> (1) the date of publication of a countervailing or antidumping duty order under this subtitle or section 1303 of this title, or
>
> (2) the date of a finding under the Antidumping Act of 1921.

19 U.S.C. § 1677g(a) (1988).

In *Timken Co. v. United States*, 37 F.3d 1470 (Fed. Cir. 1994) *("Timken")*, the Federal Circuit held an importer who posted a bond in connection with certain entries has no obligation to pay interest pursuant to 19 U.S.C. § 1677g. The Court's opinion notes "the requirement to make cash deposits of estimated duties, under the duty order, triggers the interest provision. Without the duty order, the importer has no obligation to make a cash deposit and consequently no obligation to pay interest." *Timken*, 37 F.3d at 1477. *But cf. American Hi-Fi Intern., Inc. v. United States*, 936 F. Supp. 1032 (CIT 1996) (holding importer is liable for interest assessment on underpayment of antidumping duties pursuant to 19 U.S.C. § 1677g(a) where Commerce initially waived antidumping duty order's cash deposit requirement due to zero margin but determined significant dumping margin existed in later administrative review).

Similar to the facts involved in *Timken*, *see* 37 F.3d at 1477, the nine entries at issue in this matter entered the United States between February 16, 1984 and June 15, 1984, prior to the issuance of a countervailing duty order. *See Rheem*, 951 F. Supp. at 243. The countervailing duty or-

[1] While neither party raised this argument in the course of this proceeding, the Court includes this argument *sua sponte*.

der addressing the merchandise at issue in this matter, however, was not published until June 22, 1984, one week after the date of the last entry. *See Countervailing Duty Order; Certain Carbon Steel Products From Brazil*, 49 Fed. Reg. 25,655 (Dep't Comm. 1984). Because the relevant countervailing duty order was not published prior to the entry of the merchandise at issue in this matter, plaintiff was not obligated to make a cash deposit on any of the nine entries at issue, and indeed, posted bonds as security on the nine entries. Based on these facts, this Court determines the plaintiff has no obligation to pay interest on the nine entries pursuant to 19 U.S.C. § 1677g. *See Timken*, 37 F.3d at 1476, 1477 ("Section 1677g(a)'s 'amounts deposited' language does not encompass bonds." "In order to be liable for or entitled to interest under section 1677g(a), exporters must have made cash deposits of estimated duties.").

Based on this analysis, the Court determines the government may not collect interest on the entries at issue pursuant to 19 U.S.C. § 1505(c) or 19 U.S.C. § 1677g(a). The Court concludes neither statutory provision contains language relevant to the facts involved in this matter. Accordingly, the motions submitted by the parties are denied.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/69 8/18/97 DiCarlo, J.	Sue Trading Co., Inc.	96–08–01947	7103.10.40 18.9%	7103.99.1000 1.7%	Agreed statement of facts	Los Angeles Two imported opals
C97/70 8/19/97 DiCarlo, J.	Three Star Trading Incorporated	95–11–01543	4104.10.60 3.4% Depending upon the date of entry	4104.22.00 Duty free	Agreed statement of facts	JFK Bovine leather in the form of splits, bends, shoulders and culattas

U.S. Court of International Trade,
Office of the Clerk.

ANNOUNCEMENT

The Judges of the United States Court of International Trade announce a Special Session of the Court to recognize and honor Senior Judge Nicholas Tsoucalas for his service to the Court and the federal judiciary. This Special Session of the Court is scheduled for Friday, September 19, 1997 at 2:30 p.m. in the Ceremonial Courtroom, United States Court of International Trade Courthouse, One Federal Plaza, New York, New York.

Dated: August 22, 1997.

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